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VOL. 3097

No. 16,185 ✓

United States Court of Appeals  
For the Ninth Circuit

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FRED R. DICKSON, Warden of the California State Prison at San Quentin,  
California,

*Appellant,*

vs.

RAYNA TOM CARMEN,

*Appellee.*

Appeal from the United States District Court for the  
Northern District of California,  
Southern Division.

APPELLANT'S OPENING BRIEF.

---

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FILED

MAY 20 1939

PAUL P. DUFFIELD, Clerk





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No. 16,185

# United States Court of Appeals For the Ninth Circuit

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FRED R. DICKSON, Warden of the California State Prison at San Quentin,  
California,

*Appellant,*

vs.

RAYNA TOM CARMEN,

*Appellee.*

Appeal from the United States District Court for the  
Northern District of California,  
Southern Division.

## APPELLANT'S OPENING BRIEF.

---

### JURISDICTIONAL STATEMENT.

The jurisdiction of the District Court was invoked under 28 U.S.C. 2241. It was appellee's theory that the commitment under which Rayna Tom Carmen was being held by Fred R. Dickson, warden of the California State Prison at San Quentin, California, was void because he is an "Indian" and the crime occurred in "Indian Country" and exclusive jurisdiction exists in the Federal courts. He contends that he is held "in violation of the Constitution of the United States" as that term is used in 28 USC 2341 (3).

The petition for writ of habeas corpus was filed in the United States District Court on February 11, 1958 by Rayna Tom Carmen. (R 3-7.) The court entered an order on February 12, 1958 dismissing without prejudice and granted petitioner 20 days in which to amend his petition. (R 8.)

Thereafter his amended petition for writ of habeas corpus was filed on April 2, 1958. (R 9-39.) An order to show cause was issued by the Honorable Louis E. Goodman, District Judge, requiring respondent to appear on the 23rd of April, 1958. (R 34.) Return to the order to show cause was filed by respondent on April 23, 1958. (R 34-54.)

The transcript of the trial in the criminal proceeding in the California Superior Court was filed with the court pursuant to the case of *Brown v. Allen*, 344 US 443. (R 91.) Likewise, the reporter's transcript of the proceedings before the referee in the State habeas corpus action was filed with the District Court pursuant to *Brown v. Allen*, 344 US 443. (R 91.) Thereafter, the matter was argued at length before the court. On September 11, 1958 the District Judge filed an opinion and order granting a writ of habeas corpus. (R 54-76.) The District Court, on September 12, 1958, entered an order directing the release of petitioner from custody. On September 16, 1958, the District Judge denied appellant's application for certificate of probable cause. (R 78-83.)

On September 15, 1958 a notice of appeal was duly filed. (R 84.) A statement of points was filed on October 3, 1958. (R 84-86.) A certificate of probable

cause was obtained from this court. (R 107-108.) This appeal is taken pursuant to 28 USC 2253.

The validity of the following statutes as interpreted and applied by the United States District Court is involved in this appeal:

18 USC 1151; 63 Stat. 94.

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 USC 1152, 62 Stat. 757.

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

18 USC 1153, 63 Stat. 94.

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder,



manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

18 USC 3242, 63 Stat. 96.

All Indians committing any of the following offenses, namely, murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny on and within the Indian country, shall be tried in the same courts, and in the same manner, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States.

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#### STATEMENT OF THE CASE.

Appellee, Rayna Tom Carmen, is currently confined in the California State Prison at San Quentin on judgments of conviction of first degree murder and assault with intent to commit murder. He was first convicted in the Madera County Superior Court in 1950 of murdering Wilbur Dan McSwain. At his first trial it was alleged and proved that the crimes had been committed in Madera County. On automatic appeal to the California Supreme Court the assault conviction was affirmed and the murder conviction reversed. See *People v. Carmen*, 36 Cal. 2d 768, 228 P.2d 281.

Carmen was retried in the Superior Court of Madera County and again was convicted of first degree murder for the killing of Wilbur Dan McSwain. It was again alleged and proved that the murder had been committed in Madera County. At the time of the oral argument on the automatic appeal it was suggested for the first time that facts might be produced to show that the crime was committed on a small tract of land which constituted an Indian allotment and that exclusive jurisdiction might be vested in the federal courts. Application to produce additional evidence was denied by the Supreme Court on the ground that its jurisdiction extended only to the record before it. That court affirmed the conviction of murder in the first degree. See *People v. Carmen*, 43 Cal. 2d 342, 273 P.2d 521.

The transcript of the second trial in Madera County was filed with the District Court pursuant to *Brown v. Allen*, 344 US 443. (R. 91; R 99-100.)

Petitioner thereafter commenced habeas corpus proceedings in the California Supreme Court. He contended that he was an "Indian" and that the crime occurred in "Indian country" and that as a result the Madera County Superior Court did not have jurisdiction.

The California Supreme Court appointed a referee. The referee held hearings in Sacramento, Madera, and San Quentin. The reporter's transcript of the oral testimony before the referee was filed in the District Court pursuant to *Brown v. Allen*, supra, and pursuant to stipulation. (R 91, R 99-100.) This

transcript will hereinafter be referred to as Calif. H.C.R.

The California Supreme Court denied the writ of habeas corpus on the ground that the matter should have been raised at the time of the trial in the Superior Court of Madera County and that Carmen, having had the opportunity to so raise the matter as a matter of defense in the trial court, was precluded from thereafter raising it. That decision is reported as *In re Carmen*, 48 Cal. 2d 851, 313 P.2d 817 (cert. den. without prejudice 355 US 954).

Carmen filed a petition for writ of habeas corpus in the United States District Court and said petition alleged that Carmen was an "Indian" and that the crime occurred within "Indian country", and that therefore exclusive jurisdiction existed in the federal courts. (R 14-15.) Petitioner also contended that California's procedural rule which required him to raise the matter in the trial court was unconstitutional. (R 15.)

Respondent filed a return setting up the commitments referred to herein. (R 34-54.) After oral argument, and filing of written points and authorities, the court entered an opinion and order on September 11, 1958 finding for Carmen and issuing the writ of habeas corpus. (R 54-76.)

The question involving the contention that Carmen is an "Indian" was raised by the petition, was raised at the oral argument and in the points and authorities, and was discussed in the judge's opinion. (R 14-15; R 54-76.)

The question concerning the definition of "Indian country" and the exclusive nature of the federal jurisdiction over said Indian country (18 U.S.C. §§ 1151, 1152, 1153, 3242) was raised by the petition, at oral argument, by the points and authorities, and was discussed in the judge's opinion. (R 14-15; R 54-76.)

The question concerning the validity of the state procedural rule requiring Carmen to raise the contention that he was an Indian and that the crime occurred in Indian country as a matter of defense at the time of trial or be thereafter precluded from raising the matter, was raised in the petition, at the oral argument, in the points and authorities, and was discussed in the judge's opinion. (R 15; R 54-76.)

The question concerning the interpretation of federal statutes so as to grant the state concurrent jurisdiction and the contentions concerning the unconstitutionality of the statutes as interpreted to vest the federal courts with exclusive jurisdiction over the murder by Carmen was raised at the oral argument, in the points and authorities, and is discussed in the opinion of the trial court. (R 54-76.)

---

#### **SPECIFICATION OF ERROR.**

The points upon which appellant Fred M. Dickson, warden of the California State Prison at San Quentin, will rely on appeal are:

1. The District Court has erroneously concluded that Carmen may raise the question on writ of habeas corpus that he and his victim were "Indians" within



the meaning of the federal statutes and decisions and that the crime occurred in "Indian country", and that the Superior Court of the State of California, in and for the County of Madera was without jurisdiction to try him for murder.

2. The District Court erred by not concluding that Carmen's failure to raise the question of his status, the victim's status and the locale of the crime at the proper time under State procedure precludes him from raising the question in the United States District Court.

3. The District Court erred in its failure to give any consideration to the effect on the doctrine of the exhaustion of State remedies of Carmen's failure to properly raise the question in the State courts.

4. The District Court has erred in that its findings of fact that Carmen is an "Indian" and that the murder occurred in "Indian country" are not supported by the evidence.

5. The District Court has erred in that its findings of fact that Carmen is an "Indian" and that the murder occurred in "Indian country" are incorrect conclusions of law.

6. The District Court has erred as a matter of fact and as a matter of law in determining that Carmen and his victim were "unemancipated tribal Indians" or "Indian wards" within the meaning of Federal statutes and decisions.

7. The District Court has erroneously concluded that the locale of the crime, an allotment in trust to a relative of the deceased, is Indian country.



8. The District Court erred in concluding that the Federal statutes involved grant the Federal government exclusive jurisdiction over crimes in the Indian country, rather than concurrent jurisdiction with the State.

9. The District Court has erred in failing to determine that Congress does not possess the constitutional power to pass a special penal law which is applicable to the crime and the locale here involved which excludes application of State laws, since there is a constitutional basis for only a limited Federal jurisdiction over California Indians.

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## ARGUMENT.

### I.

PROCEDURAL RULE FOLLOWED BY CALIFORNIA IN THE PRESENT CASE IS THE SAME RULE FOLLOWED BY THE FEDERAL COURTS; THE PROCEDURAL RULE IN QUESTION IS NOT IN VIOLATION OF DUE PROCESS; CARMEN'S FAILURE TO RAISE THE MATTER AT THE PROPER TIME UNDER STATE PROCEDURE PRECLUDES HIM FROM RAISING THE QUESTION IN THE DISTRICT COURT.

In discharging the writ of habeas corpus the California Supreme Court determined that a final judgment of conviction cannot be attacked on habeas corpus upon allegations of new and additional facts claimed to establish lack of territorial jurisdiction or lack of jurisdiction because of the status of the petitioner, where there is no defect in jurisdiction on the face of the record and where no exceptional circumstances exist.

Federal courts, as well as many State courts, follow an identical rule. See *Toy Toy v. Hopkins*, 212 U.S. 542 [Indian jurisdiction case]; *Davis v. Johnston*, 144 Fed. 2d 862 (9th Cir., 1944) [Indian jurisdiction case]; *Hatton v. Hudspeth*, 99 Fed.2d 501 (10th Cir., 1944) [Indian jurisdiction case]; *Ex parte Savage*, 158 Fed. 205 (Cir. Ct. D. Kansas, 1908) [Indian jurisdiction case]; *Rodman v. Pothier*, 264 U.S. 399; *In re Lincoln*, 202 U.S. 178; *Walsh v. Johnson*, 115 Fed. 2d 806 (9th Cir., 1940); and *Walsh v. Archer*, 73 Fed. 2d 179 (9th Cir., 1934) [territorial jurisdiction over vessel]. Also see *State v. Utecht*, 220 Minn. 431, 19 N.W.2d 706 [Indian jurisdiction case]; *Lehman v. Sawyer*, 106 Fla. 396, 143 So. 310 [territorial jurisdiction]. Such rule is the long-established and widely followed rule.

The California Supreme Court in the present case simply followed the long-established rule. It has always been the general rule that a defect in jurisdiction which appears on the face of the record may be raised at any stage of the proceeding or by a collateral attack. However, where the alleged defect in the jurisdiction does not appear on the face of the record, it may not be raised by a collateral attack except in exceptional circumstances. This rule is expressed in many general axioms of the law of habeas corpus; for example, the writ of habeas corpus should not do service as a demurrer. The writ of habeas corpus is not a substitute for an appeal. Habeas corpus may not be used as a substitute for a trial of a controverted question of fact. It has long been the law that all matters must be raised at the earliest moment or be

deemed waived. See *Brown v. Allen*, 344 U.S. 443, 486, 503 (1953). Also see *Dusseldorf v. Teets*, 209 F.2d 764 at 767 (9th Cir.); *Burrall v. Johnson*, 134 F.2d 614. Also see *Egan v. Teets*, 251 F.2d 571 at 576.

The exceptional circumstances which void the operation of the general rule have all been matters where, by the very nature of the alleged denial of due process, or other jurisdictional defect in the proceedings, the defendant was without opportunity to raise the matter at an earlier time. Thus, in *Mooney v. Holohan*, 294 U.S. 102 (1934), according to the allegations, the defendant had no knowledge of the alleged knowing use of perjured testimony at the time of trial. Under these circumstances he could not raise the matter at the trial. Likewise, in *Moore v. Dempsey*, 261 U.S. 886, at 888 (1922) [mob domination of the trial precluded the defendant from requesting delay or change of venue], the very nature of the denial was such as to prevent the defendant's counsel from raising the matters at the proper time. Likewise, all of the denial of counsel cases are exceptions to the general rule because, by the very nature of the denial of counsel, the defendant is denied the opportunity to raise the constitutional question at issue.

The present decision of the California Supreme Court is a simple application of these principles. In the present case no exceptional circumstances existed which would permit the applicant to collaterally attack the judgment.

The fact of the record in the State court does not even hint at a lack of jurisdiction in the Superior

Court of Madera County over the offense committed by Carmen. The term "face of the record" as used in habeas corpus proceedings means the clerk's transcript of proceedings—the indictment, information, or other pleadings. See *Hatton v. Hudspeth*, 99 Fed.2d 501 (10th Cir.). However, even if the "face of the record" be deemed to include the transcript of the proceedings of the trial, there is nothing in the transcript which indicates a lack of jurisdiction in the Superior Court of Madera County. The facts, as set out in the reporter's transcript—an exhibit is in this case—simply indicate that Carmen shot McSwain, an Indian, in the County of Madera at a place approximately three miles from the town of North Fork near the McSwain residence. Inferentially, the record shows that Carmen was an Indian; that is, Carmen testified that he at one time attended an Indian school. There is nothing in the record that establishes that the crime occurred on land which was allotted to McSwain's parents who were Indians and that the title was held in trust by the Federal Government. There is no indication that the crime occurred in such a location, and there is no evidence as to the nature of the title to the land on which the shooting occurred. Likewise, the only references direct and indirect to the status of the persons involved, the petitioner, Carmen, and his victim, McSwain, are merely references to the racial descent of those persons. The record is absolutely void of any evidence showing or even hinting at the fact that these persons are "unemancipated" or "ward" or "tribal" Indians.



The question that Carmen now seeks to raise is dependent upon questions of fact which should have been determined by the jury. There is certainly no question that a Superior Court of the State of California has jurisdiction over a criminal prosecution for murder occurring within the county. When, as here, the subject matter is within the general jurisdiction of the trial court, the claim of want of jurisdiction by reason of the existence of exceptional or peculiar circumstances must be raised at the trial. It has even been held that if the defendant wishes to rely on the fact that the offense occurred outside the State, he must prove the fact as a matter of defense. *In re Carmen*, 43 Cal. 2d 851, 313 P.2d 817. See *State v. Davis*, 203 N.C. 113, 164 S.E. 737 at 744, cert. den. 287 U.S. 649; *Lehman v. Sawyer*, 106 Fla. 396, 143 So. 310 at 313.

Thus, the question as to whether Carmen and his victim were unemancipated tribal Indians and the question as to whether the crime occurred in the "Indian country" are questions of fact which should have been raised in the trial court. These are matters of defense. That this is the rule adopted in California by the California Supreme Court is clear. Carmen's failure to utilize the proper State procedure to raise the question precludes Carmen from raising the question on habeas corpus.

Carmen's failure to use the available remedy of raising the matter in the trial court may be deemed either a waiver of his right to raise the question or

may be deemed a failure to exhaust his State remedies within the meaning of 28 U.S.C. 2254.

The United States Supreme Court in the case of *Brown v. Allen*, 344 U.S. 443 at 486-87, stated as follows:

Finally, federal courts may not grant habeas corpus for those convicted by the state except pursuant to § 2254. . . . We have interpreted § 2254 as not requiring repetitious applications to state courts for collateral relief, p. 413, *supra*, but clearly the state's procedure for relief must be employed in order to avoid the use of federal habeas corpus as a matter of procedural routine to review state criminal rulings. A failure to use a state's available remedy, in the absence of some interference or incapacity, such as is referred to just above at notes 32 and 33, bars federal habeas corpus. The statute requires that the applicant exhaust available state remedies. To show that the time has passed for appeal is not enough to empower the Federal District Court to issue the writ. The judgment must be affirmed.

Also see the similar language in the same case at page 503, which is as follows:

“. . . Normally rights under the Federal Constitution may be waived at the trial, *Adams v. United States ex rel. McCann*, 317 U.S. 269, and may likewise be waived by failure to assert such errors on appeal. Compare *Frank v. Mangum*, 237 U.S. 309, 343. When a State insists that a defendant be held to this choice of trial strategy and not be allowed to try a different tack on State habeas corpus, he may be deemed to have waived



his claim and thus have no right to assert on federal habeas corpus. . . .”

The District Court has not given proper consideration to the effect of Carmen’s failure to properly raise the question in the state courts. The District Court has not discussed the doctrine of the exhaustion of state remedies in this regard, nor has it adequately discussed the doctrine of waiver.

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## II.

**THE PETITIONER AND THE DECEASED WERE EMANCIPATED INDIANS, THEY WERE NOT INDIAN WARDS, AND THEY WERE NOT MEMBERS OF AN INDIAN TRIBE WITHIN THE MEANING OF STATUTES OR DECISIONS; THE DISTRICT COURT ERRED AS A MATTER OF FACT AND LAW IN DETERMINING THAT THIS PETITIONER WAS AN “INDIAN”.**

There is no evidence in either the trial record or the record of proceedings on habeas corpus that Carmen and McSwain were Indians within the meaning of the Federal statutes and decisions. An Indian who has been emancipated in some manner as, for example, by severing tribal relations and taking on civilized habits are not Indians within the meaning of the Federal statutes. See 25 USC section 349; *Louie v. United States*, 274 F. 47, 49 (murder); *People v. Ketchum*, 73 Cal. 635, 638-639 [15 P. 353]; *State v. Bush*, 195 Minn. 413 [263 N.W. 300, 302-303]; *State v. Campbell*, 53 Minn. 354 [55 N.W. 553, 554, 21 L. R.A. 169]; *State v. Monroe*, 83 Mont. 556 [274 P. 840, 842-843] (manslaughter); *People v. Living-*

*stone* (Sup. Ct., N.Y.), 123 Misc. 605 [205 N.Y.S. 888, 894-895]; *State v. Nimrod*, 30 S.D. 239 [138 N.W. 377, 378-379]; *State v. Howard*, 33 Wash. 250 [74 P. 382, 384-385] (murder); see also *Irvine v. District Court*, 125 Mont. 398 [239 P.2d 272, 275] (burglary); *State v. Big Sheep*, 75 Mont. 219 [243 P. 1067, 1070, 1071].

The District Court erred in determining that Carmen was an "Indian ward" or "unemancipated Indian". The District Court erred in determining that the Mono Indians have a tribal organization within the contemplation of the statutes or decisions. The evidence in the California habeas corpus proceeding, the transcript of which proceeding was placed before the District Court pursuant to *Brown v. Allen*, 344 US 443, establishes that the Mono Indians have no organization; they have no chiefs (Calif. H.C.R. 135:21; 105:20); they have no rules and regulations, and they impose no sanctions (Calif. H.C.R. 101:12-17; 102-103:6). In fact, said Indians are less organized than any other racial group.

There is evidence to substantiate the existence of certain customs followed by Mono Indians. However, it is submitted that the evidence establishes that many of these customs are limited to the elderly Indians. It is also submitted that said customs, such as gathering acorns, are not tribal in nature. They differ only slightly from similar customs of other racial groups which have no organizational feature.

It is submitted that the finding of the District Court that Carmen had never severed tribal relations or become otherwise emancipated is not supported by the

evidence. Of course, this question turns on the meaning of the words "severed" and "emancipated". It is submitted that Carmen, according to the District Court's findings, could no more emancipate himself or sever tribal relations than he could repudiate his descent. (Calif. H.C.R. 131:6-15.) The evidence established that there were no sanctions for failure to attend what the state referee described as the main distinguishing tribal feature, the burial ceremony (e.g., 131:16-21). Perhaps a person in Carmen's tribe could become emancipated by boycotting the funeral service where attendance was voluntary. It is submitted, however, that attendance was only natural and the ceremony was not unlike the individualistic ceremonies of other racial groups.

Neither Carmen nor his victim was ever controlled or supervised in any way by either an Indian organization or by the Bureau of Indian Affairs. The record establishes that Carmen was partially educated in the State public schools (Calif. H.C.R. 129:18), was committed to a State hospital (Calif. H.C.R. 121:7), served in the U. S. Army (Calif. H.C.R. 123:3), draws disability pay from the Bureau of Veterans Affairs (Calif. H.C.R. 137:21), voted (Calif. H.C.R. 131-132), and was employed in various occupations in and around North Fork, Madera County (Calif. H.C.R. 132:16). He was subject to no restrictions on account of his race, legal or otherwise. (Calif. H.C.R. 106-107.) He was free to do as he pleased within the limits of the law without interference by the "tribe". (Calif. H.C.R. 102.) He was thus emancipated within legal contemplation.

## III.

THE DISTRICT COURT ERRED IN DETERMINING THAT AN ALLOTMENT FROM THE PUBLIC DOMAIN IS NOT PART OF THE INDIAN COUNTRY.

- A. The phrase "the Indian titles to which have not been extinguished" has been used for 120 years to define the term "Indian country".

Section 1151, U.S.C. Title 18, defines Indian country to include "all Indian allotments, Indian titles to which have not been extinguished". This specific reference to "allotments" occurred for the first time in 1948.

The phrase which refers to the extinguishment of Indian title has a Congressional and judicial history extending back to 1834. (4 *Stat.* 729.)<sup>1</sup> In the report of Committee of Indian Affairs to the House of Representatives concerning 4 *Stat.* 729, we find the following commentary:

"Indian country . . . will include all of the territory of the United States west of the Mississippi, not within Louisiana, Missouri, and Arkansas, and those portions east of that river, and not within the limits of any state, to which the *Indian title is not extinguished*. The southern Indians are not embraced within it. Most of them

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<sup>1</sup>This phrase also appears in the Northwest Ordinance of 1787, 1 *Stat.* 51, as follows:

For the prevention of crimes and injuries, the laws to be adopted or made shall have force in all parts of the district, and for the execution of process, criminal and civil, the governor shall make proper divisions thereof—and he shall proceed from time to time as circumstances may require, to lay out the parts of the district *in which the Indian titles shall have been extinguished*, into counties and townships. . . . [Emphasis added.]



have agreed to emigrate. To all their lands, with exception to those of a part of a single tribe, the Indian title has been extinguished; and the states in which the Indians of that excepted tribe remain, have extended their laws over them.

“This act is intended to apply to the whole Indian country, defined in the first section. On the west side of the Mississippi its limits can only be changed by a legislative act; on the east side of the river it will continue to embrace only those sections of the country not within any state to which the *Indian title shall not be extinguished*. The effect of the extinguishment of the Indian title to any portion of it, will be the exclusion of such portion from the Indian country. The limits of the Indian country will thus be rendered at all times obvious and certain.”

*House Report No. 474, 23d Cong., 1st Sess., Vol. IV, May 20, 1834.*

Likewise, numerous cases have had occasion to discuss this phrase. For example, *Bates v. Clark*, 95 U.S. 204, 209, discussing the definition of the Indian country, states as follows:

“... The simple criterion is, that, as to all the lands thus described, it was Indian country whenever the *Indian title had not been extinguished*, and they continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of Congress, unless by the treaty by which the Indians parted with their title, or by some act of Congress a different rule was made applicable to the case ...”

For other examples of the judicial use of the phrase "Indian title" see the following cases:

*Clairmont v. United States*, 225 U.S. 551, 557, *Ex parte Nowabbi*, 61 Pac.2d 1150; *Tooisgah v. United States*, 185 Fed.2d 93, at 98.

The phrase "Indian title" originally referred to land over which the Indian had uninterrupted use and occupancy. However, *Donnelly v. United States*, 228 U.S. 243, held that the statutorily recognized reservations constituted Indian country as well as did the land to which the Indians retained their original right of use and occupancy.

The present meaning of the term "Indian title" is best stated in the case of *United States v. Tillamooks*, 329 U.S. 40, at 52, footnote 50. This opinion states as follows:

"Other cases also draw no distinction between the original Indian title and a recognized Indian title. The Indian title as against the United States was merely a title in right to perpetual occupancy of the land with the privilege of using it in such mode as they saw fit until such a right of occupation had been surrendered to the government. When Indian reservations were created, either by treaty or executive order, the Indians held the land by the same character of title, to wit, the right to possess and occupy the land for the use and purposes designated. *Spaulding v. Chandler*, 160 U.S. 394, 403 (1896). Of similar tenor is *Connelly v. Balinger*, 216 U.S. 84, 91 (1910)."

B. House Report 304, 80th Congress, indicates that Indian Allotments were included in the definition of Indian country on the basis of the decision in *United States v. Pelican*.

In 1948 Indian allotments were included for the first time in the statutory definition of Indian country. In this definition Congress made a deliberate choice of the phrase "the Indian titles to which had not been extinguished." By this phrase, Congress was referring to allotments of land carved out of territory over which the Indians had uninterrupted use and occupancy and to allotments of land carved out of a statutorily-recognized Indian reservation.

This view finds convincing support in *House Report No. 304*, 80th Congress, page 492. That report at page 492 states that Indian allotments were included in the definition of Indian country on the authority of *United States v. Pelican*, 232 U.S. 442. The clause under discussion was intended to *codify* the *Pelican* rule, *not extend it*.

Thus, the inquiry turns upon a delineation of the rule in the *Pelican* case. That case determined that allotments made from lands which formerly comprised Indian country continue to be Indian country. That this is a correct statement of the holding can be demonstrated. First, the court at page 445 (232 U.S. 442), states the question before it as follows:

"The inquiry then, is whether, with respect to the part of the original reservation that is comprised in the described allotment, the United States has lost the jurisdiction which it formerly had."



Answering this query, the court, at page 449, stated:

“... The lands which, *prior to the allotment* undoubtedly formed part of the Indian country still *retained* during the trust period of distinctly Indian character . . .” (Emphasis supplied.)

Cases which followed *Pelican v. United States* consistently interpreted that case as applying only where the allotment was carved out of the Indian reservation or where the allotment was carved out of land over which the Indians had original use and occupancy. *State v. Muskrat*, 179 Minn. 180, 222 N.W. 611. *State v. Shepard*, 239 Wis. 345, 300 N.W. 305 [allotment of land not previously reservation, *Pelican* distinguished not applicable].

Also see *Tooisgah v. United States*, 186 Fed.2d 93. In that case the court acknowledged the rational distinction between allotted lands carved from the reservation “as in the *Pelican* case, . . . and an allotment of lands *Indian title to which* had not been extinguished before or subject to allotment.” (Emphasis supplied.)

The court continued by stating:

“It is argued, with reason that with the extinguishment of the Indian title to all lands in the reservation it no longer retained its Indian character, and therefore ceased to be Indian country.”

It should appear beyond dispute when the Congressional Report stated that it was codifying the rule in the *Pelican* case and when Congress deliberately selected the phrase “all Indian allotments, Indian titles

to which have not been extinguished" Congress intended to include within Indian country allotments from lands which comprised the statutorily-recognized Indian reservation and allotments from lands over which the Indians have had an uninterrupted use and occupancy. This phraseology shows a conscious intent to exclude allotments out of the public domain generally.

Indeed, had Congress meant something else it could easily have used another phrase such as "while title is held in trust" or "while title is held subject to restrictions". Instead, Congress has deliberately selected a phrase with a long legislative and judicial history including a specific history in reference to the decision in *Pelican v. United States*, 232 U.S. 442, which the statute purportedly codified.

The allotment upon which the murder of Dan McSwain occurred was part of a general public domain and not "Indian country" before allotment in trust to the Indian Maggie Jim and heirs. Any Indian title to this land which may have existed was extinguished long prior to the allotment. Thus, 18 U.S.C., §§ 1151, 1152, and 1153, do not apply.

**C.** The phrase "Indian titles to which have not been extinguished" is a limitation of the phrase "all allotments".

Section 1151, U.S.C. Title 18, defines Indian country to include "all Indian allotments, the Indian titles to which have not been extinguished". It is clear that the phrase "Indian title" is a limitation and exception to "all allotments" otherwise the statute would simply have used the term "all allotments".

The phrase "the Indian titles which have not been extinguished" has at least three possible meanings. First the phrase "Indian title" could possibly mean title in the individual Indian owner. This would hardly be a limitation on the phrase "all allotments". This interpretation also requires an unhistorical interpretation of the phrase "Indian title".

Secondly, this phrase could possibly have been intended to mean "while title is held in trust for the Indians or while title is subject to restrictions". This, however, would not be a modification of the phrase "all allotments" since the land would cease to be an allotment when the title was given to the Indian in fee simple.

The third possibility is that this phrase was intended to include within Indian country, all allotments from reservations and from land over which the Indians have had an uninterrupted use and occupancy.

By this construction public domain allotments are excluded from Indian country. This third possibility is the sense in which Congress and the courts have used the phrase "Indian title" for 120 years.

It is significant to note the great weight attached by the Solicitor of the Interior Department to the absence of the modifying phrase "the Indian titles to which have not been extinguished" in interpreting which is now subdivision (a) of section 1151, U.S.C. Title 18. In this regard the Solicitor stated:

"The probable judicial construction to the amendment would be that the amendment was intended to include within federal jurisdiction all

rights-of-way because of the previous jurisdiction over rights-of-way in Indian reservations. Prior to the passage of the amendment the courts had concluded that rights-of-way to which the Indian title had not been extinguished remain part of the reservation and within federal jurisdiction, whereas other rights-of-way to which such title had been extinguished was subject to state jurisdiction. The court would presume that in view of this state of the law any amendment referring to rights-of-way generally would be intended to provide a uniform rule. If only a statement of existing law had been intended, the reference in the amendment would rather have been to rights-of-way to which the *Indian title had not been extinguished*, or no mention of the subject would have been made at all." (Emphasis added.) (*Memo. Solicitor Interior Department*, July 3, 1940.)

See *Cohen, Handbook of Federal Indian Law*, 1942 Ed., page 358.

The proper definition of the phrase "the Indian titles to which have never been extinguished" is an important question in California as well as the rest of the states. There are two basic types of allotments, allotments from the public domain and allotments from Indian reservations. There are 905,037 acres of land allotted from public domain in the United States. There are 11,728,548 acres of land allotted from Indian reservations in the United States. There are 56,325 acres of land allotted from the public domain in California. There are 53,750 acres of land allotted from Indian reservations in California. *House Re-*



port 2503, 82nd Congress, Second Session, pages 67 and 72.

Certainly Congress did not intend to scatter islands of exclusive Federal jurisdiction throughout the national forests and throughout a community such as North Fork, where the Indians live on their allotments in areas surrounded by non-Indians.

Since the 1953 legislation there is no question as to California's jurisdiction over crimes in the Indian country. However, Indian liquor legislation utilizes this same definition of "Indian country". *Public Law 277*, 1953. That legislation, however, grants the Indians local option in the Indian country. Thus, if an allotment from the public domain is Indian country, Maggie Jim's heirs and others in a like position may exercise their option so as to permit sale of liquor on their allotments.

Thus, in the Sierra National Forest where there are at least 18 allotments, the individual Indian owners could determine the particular brand of liquor regulation applicable to their allotments. Some might permit on-sale liquor regulations, others might permit off-sale liquor regulations. The variations in liquor regulation could be as numerous as the individual allotments.

## IV.

THE FEDERAL STATUTES DO NOT WARRANT THE INTERPRETATION THAT THE FEDERAL GOVERNMENT HAS EXCLUSIVE JURISDICTION OVER INDIAN COUNTRY.

The federal statutes, 18 U.S.C. 1150-1153, and 3242, do not warrant the interpretation that exclusive jurisdiction is vested in the federal courts.

Section 1152 reads in part:

“Except as otherwise expressly provided by law, the general laws of the United States as to punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States . . . shall extend to the Indian country.”

The words “sole and exclusive” do not apply to the jurisdiction extended over the Indian country, but are only used in the description of the laws which are extended to it. *In re Wilson*, 140 U.S. 575, 578, *Ex parte Nowabbi*, 61 Pac.2d 1139 at 1150 (Okla.). Compare *State v. McAlhaney*, 220 N.C. 387, 17 S.E.2d 352.

Likewise, secs. 1153 and 3242 provide that all Indians committing designated offenses within Indian country “shall be tried in the same courts, and in the same manner, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States”.

These provisions are a mere direction that the substantive and procedural laws which apply to certain crimes within the exclusive jurisdiction of the United States apply to the same crimes by Indians. The word “exclusive” is not a description of the jurisdic-



tion, but rather a description of the law to which the offenders are subject. See *United States v. Kagama*, 118 U.S. 375 at 382.

The federal government does not exercise a "territorial jurisdiction" over Indian country.

The nature of this "jurisdiction" is shown by the fact that the state has "sole jurisdiction" over certain crimes in the Indian country, excluding cessions and treaties. *United States v. McBratney*, 104 U.S. 621, *Draper v. United States*, 164 U.S. 240 [both cases hold that the state had sole jurisdiction of a crime committed by a non-Indian against a non-Indian in the Indian country]; *New York v. Martin*, 326 U.S. 496, *People v. Pratt*, 20 Cal.App.2d 618 [state has jurisdiction over a crime committed by an emancipated Indian in Indian country].

See, also, *Surplus Trading Co. v. Cook*, 281 U.S. 647, 650-651, which states that "reservations are part of the state within which they lie and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards".

The historical background supports the conclusion that these statutes did not purport to grant exclusive jurisdiction to the federal courts. These statutes sought to prevent criminals from going unpunished. As is pointed out in *United States v. Kagama*, 118 U.S. 375, at 382, 383, section 1153, Title 18, U.S.C. was enacted after the decision in *In re Crow Dog*, which held that the United States court had *no* jurisdiction over a crime by an Indian since no statute cov-

ered that particular state of facts. The problem has been one of lack of prosecution. See *H.R. Rep. No. 2704*, 57th Congress, 1st Session, page 1, which complains of lax prosecution by the States.

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## V.

### THE FEDERAL GOVERNMENT AND THE STATE OF CALIFORNIA HAVE CONCURRENT JURISDICTION AS TO CERTAIN CRIMES COMMITTED IN "INDIAN COUNTRY".

Certain Indians are in an ambiguous status—they are both wards of the federal government and citizens of the state in which they reside. It will be noted that the statute extending federal jurisdiction over crimes by Indians against other Indians was expressly passed to prevent such crimes from going unpunished. (See *United States v. Kagama*, 118 U.S. 375, 382, 383.) There is nothing in these acts which precludes a state from exercising its criminal jurisdiction over the same criminal act. See *United States v. McGowan*, 302 U.S. 535, which disclaims exclusive jurisdiction. Also, see *Donnelly v. United States*, 228 U.S. 243, which upholds federal jurisdiction against an argument that the state had exclusive jurisdiction. That case, however, does not claim exclusive jurisdiction in the federal courts.

The Indian ward is subject to two jurisdictions; his act may be a crime in each jurisdiction. There are numerous situations where the identical act constitutes a federal and a state crime. An example of concurrent criminal jurisdiction is the case where a harbor pilot is subject to criminal sanctions in both the

federal and state courts for his negligence. (*People v. Welch*, 36 N.E. 328, 141 N.Y. 266 (1894). See, generally, note 16 A.L.R. 1231.)

The mere fact that an act may be a crime under the federal law does not render the state law punishing the same act unconstitutional as an interference with a federal function. *In re Dixon*, 41 Cal.2d 576; *California v. Zook*, 336 U.S. 725, 733; *Nelson v. Pennsylvania*, 350 U.S. 497.

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## VI.

THE DOCTRINE OF UNITED STATES *v.* KAGAMA IS OBSOLETE; THUS THERE IS A CONSTITUTIONAL BASIS FOR ONLY A LIMITED FEDERAL JURISDICTION OVER CALIFORNIA INDIANS; THE APPLICABLE STATUTES ARE UNCONSTITUTIONAL AS INTERPRETED AND APPLIED BY THE DISTRICT COURT IN THE CIRCUMSTANCES OF THE PRESENT CASE.

- A. Congress does not possess constitutional power to pass a special penal law which applies to California Indians and which excludes application of state law.

If the federal statutes, 18 U.S.C. 1151-1153, 3242 are interpreted as granting exclusive jurisdiction over the crime in this case to federal courts, they are unconstitutional.

Although the federal government may have *concurrent* power, it cannot assert exclusive power over a crime committed by a person of Indian descent, who is subject to no federal restrictions, who lives where he wishes, who is entitled to the full protection of California law, and where the crime is committed on land allotted to an Indian out of the national forest, over which California has never ceded jurisdiction.

There are two possible grounds for ousting the State of California from jurisdiction over the crime of murder.

The first ground is that the federal government has exclusive territorial jurisdiction, e.g., a cession by the state or a military enclave. This is not such a case; California has never ceded jurisdiction over the land concerned in this case.

The only other ground for excluding California from jurisdiction is that California, by exercising criminal jurisdiction, is interfering with a federal function. Federal power over Indians rests on peculiar historical circumstances which no longer exist.

There are four possible sources of federal power over Indian affairs. These four are as follows: (1) the power to make treaties, Art. II, § 2, United States Constitution, (2) the power to regulate commerce "with the Indian tribes", Art. I, § 8, United States Constitution, (3) the power to regulate the use of federal property, Art. IV, § 3, (4) the power to protect "wards" of the federal government. *United States v. Kagama*, 118 U.S. 375. Also see *Williams v. Lee*, ..... U.S. ...., 79 S. Ct. 296, 3 L. ed. 2d 251.

The treaty power has been the basis for many decisions concerning Indian affairs. However, there has never been a treaty between the federal government and any California tribe of Indians.

The commerce power and the power to regulate use of government property have been the constitutional basis for the Indian liquor cases. For example, the



case of *United States v. Nice*, 341 U.S. 591, relies on the power of Congress to regulate commerce with the Indians, and *Hallowell v. United States*, 221 U.S. 317, relies on the power to regulate use of government property. Respondent does not question the power of the federal government to regulate liquor traffic with the Indians. These decisions are inapplicable to the present problem.

The case of *United States v. Kagama*, 118 U.S. 375 discusses the basis of federal power over Indians. That case considers the clause giving Congress power to regulate commerce with the Indians as a possible source of federal power to punish Indian crimes. It expressly rejects that possibility.

The *Kagama* case bases federal power over crimes by Indians upon a wardship theory (118 U.S. at 383). In this regard the court stated as follows:

“These Indian tribes *are* the wards of the nation. They are *communities dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. Because of local ill feeling, the people of the states where they are found are often their deadliest enemies.”

The statements made to support the *Kagama* decision are no longer true today. First, all Indians have been declared citizens of the United States. (§ 43 United States Stats. 253, 8 U.S.C. 604.) Furthermore, Indians residing within the boundaries of California are citizens of the State of California and

entitled to the protection and privileges which flow from that status. (*Anderson v. Mathews*, 174 Cal. 537 [right to vote]; *Piper v. Big Pine School Dist.*, 193 Cal. 664 [right of Indian to send children to nearest state school]; *Acosta v. County of San Diego*, 126 Cal.App.2d 455; also note, 18 *Ops. Cal. Atty. Gen.* 88 [right of reservation Indian to indigent relief, old age assistance and other welfare services]. (Calif. H.C.R. 93, 65.) See "*The Legal Status of the California Indian*", 14 Cal. Law Rev. 83 and 157.)

"The Association on America Indian Affairs" challenges the doctrine that Indians are under federal guardianship and challenges all power exercised under the "wardship" doctrine. It is contended that though Indians may receive special benefits under federal statutes, it does not automatically follow that they become subject to exclusive Congressional control. See *Felix Cohen, Indian Wardship*—the twilight of a myth. *The American Indian*, Summer 1953.

It is evident that there has been a gradual growth and development in the economic, social, and legal status of Indians in California from a dependent and depressed status in the 1850's to the present full status of citizens and voters, with all the privileges which flow from that status. See Goodrich, "*The Legal Status of the California Indians*", 14 Cal. Law Rev. 83, 157. Also, see House Report 2503, 82nd Congress, 2nd Session.

It has been the policy of both the federal and state governments to make the Indians economically self-



sufficient so that there will be no need for the Bureau of Indian Affairs. See House Report 2503, 82nd Congress, Second Session, pp. 1150-1151 for statistics on employment and education of California Indians. Indeed, the record indicates that Carmen and the other Indians in the North Fork area worked at various odd jobs, such as mining, logging, power line maintenance and as ranch hands.

Rights and obligations have gradually been added to the Indian's bundle of rights and obligations until today his rights are indistinguishable from those of any other citizen. Such an Indian is in fact no more a "ward" of the federal government than a non-Indian war veteran who may be entitled to term insurance, medical and other special benefits from the federal government. *Acosta v. County of San Diego*, 126 Cal.App.2d 455.

Indians have the rights and protection of citizens and likewise they have the responsibilities of citizens. They have the responsibility of abiding by criminal statutes; failure to so abide subjects them to the same penalties to which other citizens are subject.

Congress itself has recognized the change in the condition of the California Indian. It has expressly stated that California has jurisdiction over crimes by Indians in Indian country within the state. (Public Law 280, 1953.)

Indeed, the assertion of exclusive federal power over the present crime in the present state of affairs stands on precarious constitutional grounds.

- B. Assuming that Congress possesses constitutional power to enact a penal law which is applicable to California Indians, but not other California citizens, nevertheless, the statute as here applied is unreasonable.

The opinion of *Perrin v. United States*, 232 U.S. 478 at 486, stated that the federal "power is incident only to the presence of the Indians and their *status* as wards of government, it must be conceded that it does not go beyond what is reasonably essential to their protection, . . . and must be founded upon some reasonable basis."

That opinion continues:

"... A prohibition valid in the beginning doubtless would become inoperative when, in the regular course, the Indians were emancipated from federal guardianship and control, a different view would involve an unjustified encroachment upon a power obviously residing in a state."

In the present case there are two factors which when combined make the statute as applied unreasonable. Here we have a person who may live where he pleases. He does not live on a reservation. He is subject to no control by an Indian commissioner (Calif. H.C.R. 65); subject to no control by the Marshal (Calif. H.C.R. 53:2, 65); subject to no control by the tribe. (Calif. H.C.R. 101-103, 131.) He is competent to contract. Defendant, in short, is subject to no restrictions on account of his race. He is an emancipated Indian. The relationship between Carmen and the federal government is based upon his racial descent only.

Also, the locale of the crime was an allotment from the public domain. The allotment was never a part of a reservation or Indian community. It is in fact surrounded by residences of non-Indians, as well as Indians (Calif. H.C.R. 133), the public domain, private holdings, and resorts.

To apply a federal penal statute, to the exclusion of a state statute, to an offense committed by this emancipated Indian in this locale is unreasonable and thus unconstitutional.

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#### CONCLUSION.

It is respectfully submitted that the judgment and order of the District Court be reversed.

Dated, San Francisco, California,  
February 24, 1959.

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(Appendix Follows.)

## **Appendix.**



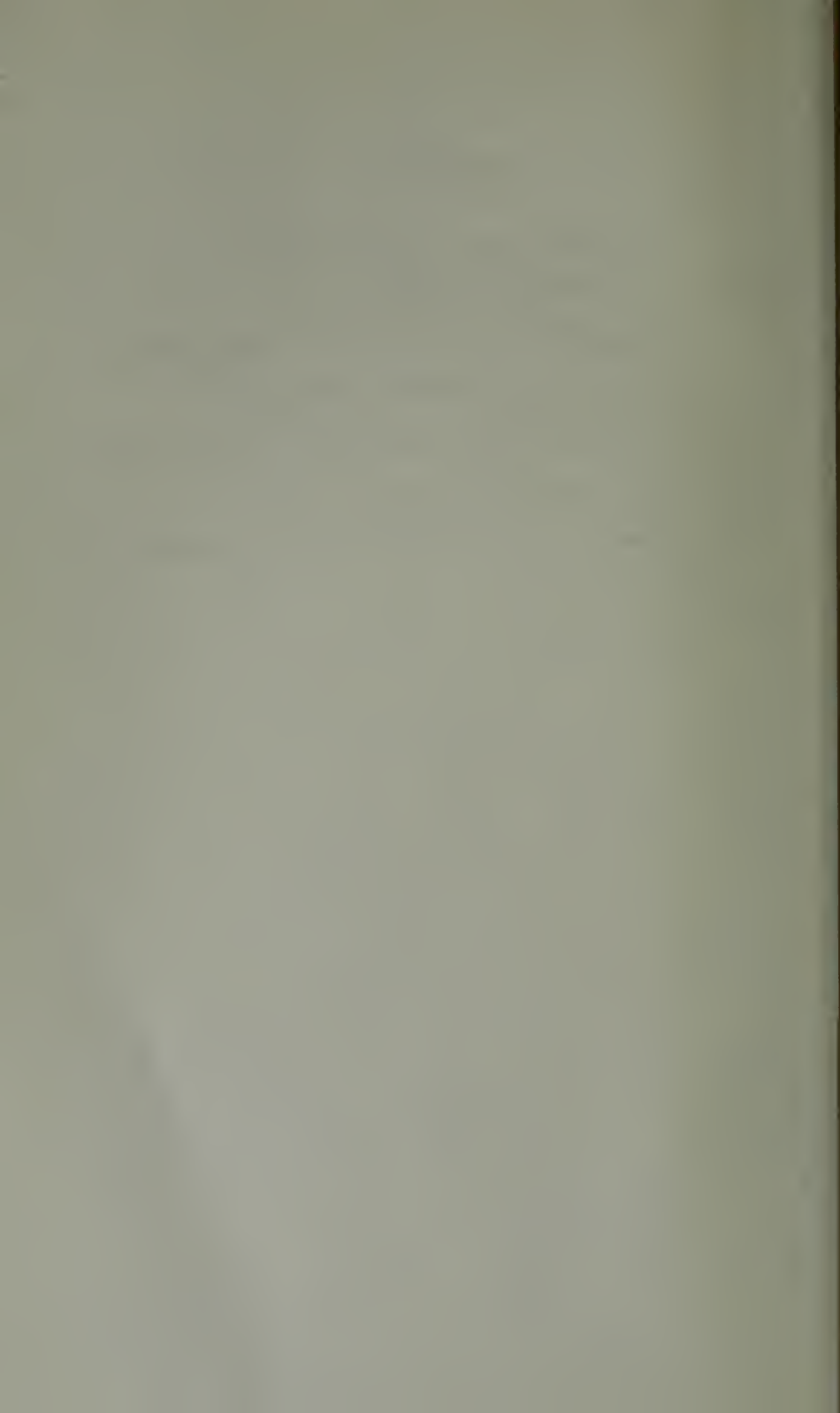
## Appendix

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### EXHIBITS OFFERED AND RECEIVED

Transcript of proceedings in the Madera County Superior Court in the action entitled People v. Rayna Tom Carmen .....	R 91, R 99-100
Reporter's transcript of proceedings before referee appointed by the California Supreme Court in the habeas corpus action entitled In re Carmen .....	R 91, R 99-100
Report of referee appointed by the California Supreme Court in the habeas corpus action entitled In re Carmen .....	R 100-101





No. 16,185

**United States Court of Appeals  
For the Ninth Circuit**

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FRED R. DICKSON, Warden of the California State Prison at San Quentin,  
California,

*Appellant,*

VS.

RAYNA TOM CARMEN,

*Appellee.*

Appeal from the United States District Court for the  
Northern District of California,  
Southern Division.

**APPELLEE'S REPLY BRIEF.**

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No. 16,185

# United States Court of Appeals For the Ninth Circuit

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FRED R. DICKSON, Warden of the California State Prison at San Quentin,  
California,

*Appellant,*

vs.

RAYNA TOM CARMEN,

*Appellee.*

Appeal from the United States District Court for the  
Northern District of California,  
Southern Division.

## APPELLEE'S REPLY BRIEF.

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### HISTORY OF THE CASE.

On May 15, 1950, an Information was filed in the Superior Court of the State of California in and for the County of Madera charging the defendant, Rayna Tom Carmen in the First Count with the crime of murder of Wilbur Dan McSwain, and in the Second Count with assault with a deadly weapon to commit murder on the person of Alvin McSwain. On May 15, 1950, said Court appointed Mason A. Bailey attorney to represent said defendant.

The defendant was thereafter found guilty on both counts and sentenced to death. On appeal to the Su-

preme Court of the State of California, the judgment was reversed as to count one (murder) and affirmed as to count two (assault). The ground for reversal was the refusal of the trial court to give proper instructions. This case is reported in *People v. Carmen*, 36 Cal. (2d) 768; 228 Pac. (2d) 281.

In October of 1951, defendant was retried on the murder charge in the Superior Court of Madera County and found guilty of the alleged crime of murder in the first degree. Defendant was again sentenced to suffer the death penalty. During the progress of the two trials, it was in evidence that the defendant and both of the McSwains were Indians.

A second appeal was then taken to the Supreme Court of the State of California. At the time set for oral argument of the appeal, Robert Peckham, an assistant United States attorney, appeared before the court and suggested that the case might present a question of Federal Jurisdiction in that the alleged crime was committed by an Indian against an Indian on United States Indian lands. The court thereupon continued the hearing for the purpose of enabling respective counsel to enter into a stipulation of facts. Such stipulations were filed, and on February 1, 1954, the California Supreme Court, by unanimous decision, reversed the judgment with directions to the trial court to dismiss the information against the defendant. The basis of the decision was the determination that the alleged crime was within the exclusive jurisdiction of the federal courts, and that the California courts had no jurisdiction. This case is reported in



*People v. Carmen*, 42 A.C. 199 (Cal.) ; 265 Pac. (2d) 900.

Thereafter, the California Supreme Court granted a rehearing and reversed its prior ruling. The basis of this decision was the holding that, in an appeal, the California Supreme Court cannot consider facts, jurisdictional or otherwise, which do not appear on the face of the record of the lower court. This decision is reported in *People v. Carmen*, 43 C. (2d) 342.

On November 10, 1954, petitioner filed his petition for Writ of Habeas Corpus before the Supreme Court of the State of California. On said date the writ was issued and the death penalty stayed pending final determination of the Habeas Corpus proceedings. On May 26, 1955, an Order of Reference was made and entered by the California Supreme Court whereby the Hon. John P. McMurray, judge of the Superior Court of the State of California in and for the County of Inyo, was appointed referee to take testimony upon certain interrogatories propounded by the court and directed to the issue of federal jurisdiction. Thereafter three hearings were held by said referee and his findings were, on May 17, 1955, filed with the California Supreme Court (Tr. 25-30). On August 2, 1957, the California Supreme Court, by a four (4) to three (3) decision, denied the writ. Dissenting opinions were filed by Justices Traynor, Carter and Schauer. This case is reported in *In Re Carmen*, 48 C. (2d) 851.

Petitioner was thereafter re-sentenced by the Superior Court of Madera County, the warrant of execu-



tion setting the death penalty for November 15, 1957. On October 25, 1957, petitioner filed his petition for Writ of Certiorari before the Supreme Court of the United States, No. 577-Miscellaneous, October Term, 1957, and on January 13, 1958, the Supreme Court denied the petition "without prejudice to an application for a Writ of Habeas Corpus in an appropriate United States District Court" (Tr. 24) (355 U.S. 954).

The defendant was again sentenced to death and the date of execution was set for April 16, 1958. On April 2, 1958, the defendant filed an amended petition for a Writ of Habeas Corpus in the United States District Court for the Northern District of California, Southern Division. The execution was stayed pending the decision of the court on a Writ of Habeas Corpus. On date of September 11, 1958, the District Court issued the Writ of Habeas Corpus and directed that the petitioner, Rayna Tom Carmen, be released from custody. From this decision, the appellant has taken an appeal to this Court.

The decision of the District Court is reported in 165 Fed. Supp. 942.

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## I.

**THE FEDERAL COURTS HAVE THE RIGHT TO INQUIRE INTO MATTERS OF JURISDICTION ON HABEAS CORPUS BY EXAMINATION OF FACTS OUTSIDE THE RECORD.**

The attorney general sought to foreclose the District Court from examining into a jurisdictional question of large importance involving an American Indian

on narrow procedural grounds (Br. 9-15). Pertinent authority shows no justification for this position.

It is fundamental that where a court is without jurisdiction over the subject matter, its proceedings are absolutely void. Therefore, an objection to jurisdiction may be raised at any stage of the proceedings, and may be raised for the first time on appeal. Thus, the court said in *United States v. Anderson*, 60 F. Supp. 649:

“Even the consent of the accused cannot confer jurisdiction, and it is an issue that can be made at any stage of the proceedings . . .” (p. 650).

See also:

*United States v. Rogers*, 23 Fed. 658;

*Matson Navigation Co. v. United States*, 284 U.S. 352, 52 S. Ct. 162, 76 L. Ed. 336;

*Gainesville v. Brown-Crummer Inv. Co.*, 277 U.S. 54, 48 S. Ct. 454, 72 L. Ed. 781.

We had presumed that this was likewise the law in California. Thus, in 13 *Cal. Jur.* (2d) 597, the California rule is stated as follows:

“Where a judicial tribunal has no jurisdiction of the subject matter on which it assumes to act, its proceedings are absolutely void in the fullest sense of the term; and a court, being competent to determine its own jurisdiction, may determine that question at any time in the proceedings, whenever that fact is made to appear to its satisfaction, either before or after judgment. Accordingly, an objection for want of such jurisdiction may be raised by answer or at any subsequent stage of the proceedings; *in fact it may*

*be raised for the first time on appeal*”\* (citing cases).

The rule has been heretofore applied in California even in civil cases, such as *Costa v. Banta*, 98 C.A. (2d) 181, where the court said:

“Although the jurisdiction of that court was not questioned during the trial, it is well established that questions of jurisdiction are never waived and may be raised for the first time on appeal” (p. 182).

With this fundamental law in mind, the California Supreme Court asked Carmen and the attorney general on appeal and in support of Carmen’s application to produce additional evidence, to file stipulations to the effect that the crime was committed by an Indian against another Indian on an Indian allotment title to which was held in trust by the United States Government. Under applicable federal statutes, exclusive jurisdiction was therefore vested in the federal courts, and the state court was without jurisdiction. In this regard, Section 777 of the California Penal Code expressly provides:

“Every person is liable to punishment by the laws of this State for a public offense committed by him therein, except where it is by law cognizable exclusively in the courts of the United States. . . .”

The California Supreme Court, therefore, by unanimous decision, concluded that the state court was without jurisdiction and that such jurisdiction was

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\*Emphasis is the author’s unless otherwise indicated.

vested exclusively in the United States courts (*People v. Carmen*, 265 Pac. (2d) 900). A rehearing was then granted, and a divided court concluded that the proposed offer to produce additional evidence on appeal should be denied (*People v Carmen*, 43 C. (2d) 342, 348). The court was careful to say, however, that "we do not pass on the question of what remedies may be available to the defendant to show alleged lack of jurisdiction in the state court" (p. 349). In respect to the stipulations above referred to, the court decided that they were insufficient to show lack of jurisdiction, but expressly refrained from determining whether the jurisdictional question could be raised by stipulations on appeal (pp. 350-351).

There followed the habeas corpus proceedings in the state court wherein the California Supreme Court ordered a reference for the purpose of determining the jurisdictional facts. After an elaborate presentation of evidence to the referee, and his unequivocal conclusion in support of Carmen's contention, the court, by a 4-to-3 decision, decided to disregard the referee's findings. The majority concluded that the appellate court was confined to the record of the trial court on habeas corpus, even in respect to matters of jurisdiction (*In re Carmen*, 48 C. (2d) 851).

In so concluding, the majority of the state court apparently overlooked or misinterpreted well-established federal and state authority. The federal rule was clearly stated in *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461, where the court said:

"True, habeas corpus cannot be used as a means of reviewing errors of law and irregularities not



involving the question of jurisdiction occurring during the course of trial; and that 'writ of habeas corpus cannot be used as a writ of error.' These principles, however, must be construed and applied so as to preserve not destroy constitutional safeguards of human life and liberty. The scope of inquiry in habeas corpus proceedings has been broadened not narrowed since the adoption of the Sixth Amendment. In such a proceeding, 'it would be clearly erroneous to confine the inquiry to the proceedings and judgment of the trial court' and the petitioned court has 'power to inquire with regard to the jurisdiction of the inferior court either in respect to the subject matter or to the person, *even if such inquiry involves an examination of facts outside of, but not inconsistent with, the record.*' Congress has expanded the rights of a petitioner for habeas corpus and the . . . effect is to substitute for the bare legal review that seems to have been the limit of judicial authority under the common-law practice, and under the act of 31 Car. II, chap. 2, a more searching investigation in which the applicant is put upon his oath to set forth the truth of the matter respecting the causes of his detention, and the court, upon determining the actual facts, is to 'dispose of the party as law and justice require.'

There being no doubt of the authority of the Congress to thus liberalize the common-law procedure on habeas corpus in order to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution or a law or treaty established thereunder, it results that under the sections cited a prisoner in custody



pursuant to the final judgment of a state court of criminal jurisdiction may have a judicial inquiry in a court of the United States *into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to test the jurisdiction of the state court to proceed to judgment against him*” (pp. 1023-1024).

See also:

*Frank v. Mangum*, 237 U.S. 309, 35 S. Ct. 582, 59 L. Ed. 969;

*Moore v. Dempsey*, 261 U.S. 886, 43 S. Ct. 265, 67 L. Ed. 543;

*Mooney v. Holohan*, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791;

*Bowen v. Johnston*, 306 U.S. 19, 59 S. Ct. 442, 83 L. Ed. 455;

*Waley v. Johnston*, 316 U.S. 101, 62 S. Ct. 964, 86 L. Ed. 1302;

*United States ex rel. McCann v. Adams*, 320 U.S. 220, 64 S. Ct. 14, 88 L. Ed. 4;

*United States v. Hayman*, 342 U.S. 205, 72 S. Ct. 263.

As a matter of fact, in at least three federal cases involving jurisdiction over Indians, facts dehors the record were examined to determine jurisdiction:

*Rice v. Olson*, 324 U.S. 786, 65 S. Ct. 989, 89 L. Ed. 1367;

*Ex parte Van Moore*, 221 Fed. 954;

*Tooisah v. United States*, 186 F. (2d) 93.

The same rule has been followed in state courts in Indian jurisdiction cases. The leading case is *State ex rel. Irvine v. District Court*, 239 P. (Mont.) 272. In a carefully considered opinion in habeas corpus, the court examined jurisdictional facts outside the record, and said:

“Since the question of jurisdiction of the state trial court involves human liberties, as well as an asserted conflict between state and federal jurisdiction over crimes committed by such an Indian within the limits of a legally constituted, supervised, Indian reservation which lies within this state, we deem it appropriate to re-examine this question.

The question of jurisdiction should be inquired into by the court at the earliest inception on its own initiative to ascertain whether that particular court has jurisdiction of that class of offense. *In re Coy*, 127 U.S. 731, 758, 8 S. Ct. 1263, 32 L. Ed. 274; *Barnes v. Hunter*, 10 Cir., 188 F. (2d) 86, 89; *Tooisgah v. United States*, 10 Cir., 186 F. (2d) 93, 96.

It should be kept in mind that all congressional legislation relative to Indians and Indian affairs has been initiated and enacted for the benefit of the Indian. As was stated by the supreme court, ‘According to a familiar rule, legislation affecting the Indians is to be construed in their interest and a purpose to make a radical departure is not lightly to be inferred.’ *United States v. Nice*, 241 U.S. 591, 599, 600, 36 S. Ct. 696, 698, 60 L. Ed. 1192.

‘The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the

nation's history.' *Rice v. Olson*, 324 U.S. 786, 65 S. Ct. 989, 991, 89 L. Ed. 1367. Historically and consistently the federal government has always defined the legal status of the Indian and the relation which has existed between the government and the Indian as that of 'guardian and ward' or 'wards of the nation'. *United States v. Thomas*, 151 U.S. 577, 14 S. Ct. 426, 429, 38 L. Ed. 276; *State of Oregon v. Hitchcock*, 202 U.S. 60" (p. 275).

See also:

*Application of Andy*, 302 P. (2d) (Wash.) 963.

We had further assumed, until the *Carmen* case, that the federal rule was also the rule in California in habeas corpus proceedings. Thus, in *In re Bell*, 19 C. (2d) 488, the court said:

"A petitioner seeking habeas corpus, however, is not confined to the face of the record in attempting to sustain the burden of proving that his conviction was in violation of his constitutional rights. The courts of both the United States and California have declared that the remedy of habeas corpus permits an examination not only of the actual evidence introduced at petitioner's trial but of any necessary additional evidence bearing upon the infringement of petitioner's constitutional rights (cited cases)" (p. 501).

See also:

*In re Connor*, 16 C. (2d) 701;

*In re Mooney*, 10 C. (2d) 1.

### Appellant's Cases.

None of the cases cited by appellant conflict in any way with the foregoing established authority. First, the appellant, on page 10 of his brief, cites a number of cases supposedly standing for the rule that facts outside the record cannot be examined on habeas corpus. In *Toy Toy v. Hopkins*, 212 U.S. 542, two Indians were indicted and convicted in the Oregon state court, and thereafter the Supreme Court of Oregon, on appeal, upheld their contention that the crime was exclusively within federal jurisdiction because committed on an Indian reservation. Thereafter, the defendants were tried and convicted in the federal court under an indictment charging "Columbia George and Toy Toy, Indians, with the murder of Annie Edna, an Indian woman, upon the Umatilla reservation." Five years after conviction, Toy Toy reversed his position and tried on habeas corpus to introduce evidence of facts showing lack of federal jurisdiction. Thus, these facts were in issue at the trial and decided adversely to defendant. Therefore defendant was properly foreclosed from raising the same issues, in habeas corpus, or otherwise.

*Davis v. Johnston*, 144 Fed. (2d) 862, is to the same effect. There the indictment charged defendant with commission of the crime within the Rosebud Indian reservation. On habeas corpus, petitioner, for the first time, tried to show that the property was not within the reservation. The court properly held:

"The uniform rule is that where the jurisdiction of the court is an issue in the trial court and is dependent upon facts alleged, the finding of juris-



diction is conclusive on the parties in a collateral attack on the judgment on habeas corpus proceedings or otherwise" (p. 862).

*Hatton v. Hudspeth*, 99 Fed. (2d) 501, is another case where the indictment charged the commission of the crime "at and in and within the limits of the boundaries of the Rosebud Indian reservation." Thus the direct question of situs was put in issue.

In *Ex parte Savage*, 158 Fed. 205, the indictment charged that "Louie Savage, an Indian, upon the Grande Ronde Indian reservation, in Oregon and within the exclusive jurisdiction of the United States, killed Foster Wacheno, an Indian". Here, again, the jurisdictional facts were expressly put in issue and decided by the lower court.

*Rodman v. Pothier*, 264 U.S. 399, is even farther afield. The indictment there charged defendant with murder "committed in territory . . . within the exclusive jurisdiction of the United States, to wit: The Camp Lewis military reservation". Not only was the jurisdictional fact decided by the Rhode Island Federal District Court, but the defendant tried to circumvent appeal by direct application for habeas corpus to the Supreme Court of the United States. Obviously this was improper, and the matter was therefore transferred to the Court of Appeals. The same situation prevails in *In re Lincoln*, 202 U.S. 178, with the same result.

*Walsh v. Johnson*, 115 Fed. (2d) 816, and *Walsh v. Archer*, 73 Fed. (2d) 179, are cases decided by this Court wherein the indictments charged crimes on the



high seas within the jurisdiction of the United States. In the *Johnson* case the defendant, at the trial, unsuccessfully contended that the vessel was within the Bay of San Pedro, and not on the high seas. In the *Archer* case, there was evidence regarding the 3-mile limit, and the jury was instructed thereon. Thus, in both of these cases the issues were raised and tried in the trial court and thereby became *res judicata*.

*State v. Utecht*, 19 N.W. (2d) (Minn.) 706, is difficult to understand from the face of the opinion. There are several distinguishing features between the case under consideration and the *Utecht* case. First: *Utecht* did not raise the question of jurisdiction on appeal, as did *Carmen*. Second: The crime was committed upon an Indian allotment for which a trust patent had been issued, and therefore was not Indian land within federal jurisdiction. The crime in the *Carmen* case was committed on land held in trust by the United States Government and for which no fee patent had been issued. (See extended discussion of the *Utecht* case in *In re Carmen*, 48 C. (2d) 851, at pp. 872-874.)

*Lehman v. Sawyer*, 143 So. (Fla.) 310, appears to be totally irrelevant. The information there charged defendant with illegally catching fish in state waters. Defendant tried to anticipate trial by bringing habeas corpus proceedings wherein he charged that the fish were caught outside of state waters. The court properly held that the defendant must submit this issue to the trial court before resorting to habeas corpus. To the same effect is *State v. Davis*, 164 S.E. (N.C.) 737 (Br. p. 13).

The second argument advanced by the appellant appears on pp. 10-11 of his brief: "It has long been the law that all matters must be raised at the earliest moment or be deemed waived."

We have already seen that it is the uniform rule, both in the federal and state courts, that matters of basic jurisdiction are *never* waived.

Nothing happened at Carmen's trials which could possibly be construed as a knowing waiver of jurisdiction. Enough facts were developed, however, to put the trial court on inquiry, as pointed out in the opinion of the District Court:

"The testimony at petitioner's trial was that both he and the victim were Indians, and that the murder occurred at the victim's residence. Although these facts alone did not fully demonstrate the lack of jurisdiction in the trial court, they should have put the State Court on inquiry as to its own jurisdiction. The right to be tried in a federal court accorded petitioner by the Ten Major Crimes Act was not a mere procedural right, waived unless asserted. It could not have been waived even by express agreement. The Ten Major Crimes Act was enacted for the protection of the Indian wards of the United States. Both the trial court and the state's attorneys had a duty to uphold this federal statute. They had a responsibility to see to it that the court did not improperly assume jurisdiction over an Indian ward of the Federal government" (*In re Carmen*, 165 Fed. Supp. 942, 950).

There is nothing in the four cases cited by appellant (Br. p. 11) in support of his implied contention

that jurisdiction is waived by silence in the trial court: (1) *Brown v. Allen*, 344 U.S. 443, did not involve matters of jurisdiction. The issues were alleged discrimination against Negroes in the selection of grand and petit juries and whether a confession was voluntary. The case does not involve waiver because these issues were raised in the North Carolina trial court, and affirmed on appeal. (2) In *Dusseldorf v. Teets*, 209 Fed. (2d) 764, the defendant challenged the ability and competency of his attorney in the California trial court. On appeal to the California Supreme Court, defendant's new counsel did not raise this issue. The Federal District Court denied habeas corpus and this Court affirmed on appeal, holding that defendant's failure to press his claim of inadequate representation by counsel either by motion to the state district court or on appeal constituted a waiver of this right and precluded relief on habeas corpus. Significantly this Court cited with approval *Moore v. Dempsey*, 261 U.S. 886, and stated that the facts did not go to the foundation of the proceedings. (3) *Burrall v. Johnson*, 134 F. (2d) 614, is completely inapposite. A jurisdictional issue was not involved. After conviction in the federal court in 1939, defendant sought habeas corpus in 1943 because of an allegedly coerced confession. Defendant had failed to appeal. Obviously defendant was four years too late in raising the issue in habeas corpus, or otherwise. (4) In *Egan v. Teets*, 251 Fed. (2d) 571, the claim was made on habeas corpus that the state trial judge had suppressed a certain appeal paper. This claim was not asserted on appeal, although it must have

been known to the defendant's counsel. This Court therefore held that the claim was waived, but was careful to point out:

“Non-assertion of a constitutional right in court proceedings in which it would be appropriate is not necessarily a waiver of such right. As appellee himself concedes, a constitutional question may be raised at any time if the matter appears on the face of the record, or if it is of such nature that it could not have been raised before. *A matter is of such nature if the person asserting it did not have knowledge of the facts upon which it is based, or if, for some other adequate reason, such person was prevented from asserting it*” (p. 576).

Thirdly, commencing on p. 11 of his brief, appellant repeats an argument urged before the District Court, to wit, that this case does not involve “exceptional circumstances” within the federal rule. This argument is difficult to understand in the light of the established rule, both in the federal and state courts, that matters of jurisdiction may and should be raised at any stage of the proceedings, and may be raised for the first time on appeal (*Matson Navigation Co. v. United States*, 284 U.S. 352, 52 S. Ct. 162, 76 L. Ed. 336; *People v. Oakland Waterfront Co.*, 118 C. 234, 239).

In any event, the circumstances, as outlined by the District Court, are certainly “exceptional”. These circumstances impelled the District Court to state:

“But respondent urges that even if it be conceded that this Court has the power in this proceeding  
737 (Br. p. 13).



to look to facts outside the trial record to test the jurisdiction of the State court, the exercise of this power is proper only upon a showing of exceptional circumstances. However one might characterize the circumstances in this case, they clearly warrant the exercise of this Court's power to inquire into the jurisdiction of the State court" (165 F. Supp. 950).

\*       \*       \*       \*       \*

"Under these circumstances, it becomes the plain duty of this Court to protect the jurisdiction vested in the Federal Courts by the Ten Major Crimes Act" (165 F. Supp. 951).

Appellants suggest that a claim of lack of jurisdiction because of the violation of a constitutional right is more sacrosanct than a claim of the wrongful assumption of jurisdiction in violation of a federal statute. Appellant cites *Mooney v. Holohan*, 294 U.S. 102 (Br. p. 11), where defendant had no knowledge of the alleged use of perjured testimony. In the present case Carmen had no knowledge of facts conferring exclusive jurisdiction under the applicable federal statutes. The writ of habeas corpus is available to all persons "in custody in violation of the Constitution or laws or treaties of the United States" (28 U.S.C. Sec. 2241). We respectfully conclude, therefore, that appellant raises a distinction without a difference.

Finally, appellant suggests a novel argument: that Carmen failed to exhaust his state remedies by not urging lack of jurisdiction in the trial court (Br. p. 14). The sole authority cited is *Brown v. Allen*, 344 U.S. 443. This case is inapplicable here. In



the first place, *Brown v. Allen*, unlike the present case, did not involve a jurisdictional question. The defendants there objected to discrimination in jury lists and alleged coercion of confessions. These matters were decided adversely to the defendants by both the North Carolina trial court and the North Carolina Supreme Court. In addition, there was available in North Carolina the writ of error *coram nobis* to test constitutional rights extraneous of the record. In the present case Carmen was unable to raise the question of jurisdiction in the trial court, and was denied this right on appeal and on habeas corpus.

In the allied case of *Daniels v. Allen* there was an additional feature: the failure of Daniels to perfect his appeal within the 60-day period permitted by North Carolina law. Mr. Justice Reed chose to decide the *Daniels* case on this ground and said:

“As the failure to serve the statement of the case on appeal seems to us decisive, we do not discuss in detail the other constitutional issues tendered and only point out that they were resolved against petitioners by the sentencing state court and the Federal District Court” (73 S. Ct. 420; 344 U.S. 483).

We thus understand the meaning of the quotation from Mr. Justice Reed’s opinion appearing out of context on page 14 of appellant’s brief. That the justice in no way intended to overrule *Johnson v. Zerbst, supra*, is clearly shown by his citation of that case (73 S. Ct. 422) with approval.

The second quotation on page 14 of appellant’s brief is taken from the minority opinion of Mr. Justice

Frankfurter wherein he refers to the general rule that constitutional rights, such as right to trial by jury (*Adams v. United States ex rel. McCann*) or the right of the accused to be present at all stages of a trial (*Frank v. Mangum*) may be knowingly waived at the trial or by failure to assert such errors on appeal. That Justice Frankfurter likewise had no intention of invading the rule of *Johnson v. Zerbst* or *Moore v. Dempsey, supra*, is clearly shown by the concluding sentence of the paragraph quoted by appellant:

“However, this does not touch one of those extraordinary cases in which a substantial claim goes to the very foundation of a proceeding, as in *Moore v. Dempsey*, 261 U.S. 886, 43 S. Ct. 265, 67 L. Ed. 543. Cf. *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872; *Ex parte Royall*, 117 U.S. 241, 6 S. Ct. 734, 29 L. Ed. 868.”

We therefore conclude that under both federal and state authority, the United States District Court has the power on habeas corpus to examine jurisdictional facts outside the record in support of a federal statute vesting exclusive jurisdiction in the courts of the United States. This would appear to be particularly true where the applicant is a ward of the federal government who made a prompt effort to present the jurisdictional facts on appeal as soon as they were suggested by the U.S. attorney.

## II.

**THE CRIME OF MURDER BY AN INDIAN AGAINST AN INDIAN  
ON INDIAN LAND IS WITHIN THE EXCLUSIVE JURISDICTION  
OF THE UNITED STATES.**

We now come to the merits of this controversy. The basic facts contained in the stipulations filed with the California Supreme Court and the additional evidence offered before the referee on habeas corpus are uncontroverted:

(1) Wilbur Dan McSwain, the deceased, was an Indian;

(2) Rayna Tom Carmen is likewise an Indian;

(3) The crime was committed on the Maggie Jim Allotment, which consists of land held in trust by the United States Government for a 25-year period (Federal Register, November 14, 1944; 9 F.R. 3699, Executive Order No. 9500, U.S. Cong. Service 1944, p. 1539).

Under such circumstances, it is clear that applicable Federal statutes vested exclusive jurisdiction in the United States and its courts:

18 U.S.C.A. Sec. 1151 defines "Indian Country" as follows:

"(a) all land within the limits of any Indian reservation under the jurisdiction of the United States government *notwithstanding the issuance of any patent*, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c)

*all Indian allotments, the Indian titles to which have not been extinguished including rights of way running through the same."*

18 U.S.C.A. Sec. 1152 specifies what law governs the Indian country:

"Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country."

18 U.S.C.A. Sec. 1153, commonly known as the Ten Major Crimes Act, provides that *any Indian* who commits one of the ten major crimes (including murder or assault with a dangerous weapon) against another Indian or other person shall be subject to the same laws and penalties as all other persons committing any of such offenses *within the exclusive jurisdiction of the United States*. The section reads:

"*Any Indian* who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States."

18 U.S.C.A. Sec. 3242 provides that *all Indians* committing any of the ten major crimes within Indian country shall be tried in the *same courts* as all other



persons committing such crimes *within the exclusive jurisdiction of the United States*. This section reads:

“*All Indians committing any of the following offenses, namely, murder, manslaughter, rape, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery and larceny on and within the Indian Country, shall be tried in the same courts, and in the same manner, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States.*”

It is therefore apparent that the applicable Federal statutes unequivocally reserve exclusive jurisdiction in this case to the United States.

This was the situation that prevailed at the time the crime was committed. The meaning of the statutes and the intent of Congress is clear when we observe that it was not until Public Law 280 was passed by the first session of the 83rd Congress in 1953 that California Indians were emancipated and California courts were granted jurisdiction in this situation. This is now Section 1162 of Title 18 of the United States Codes Annotated. At the time of the crime in question, however, Congress had not seen fit to relinquish the exclusive jurisdiction of the United States.



## III.

THE FEDERAL STATUTES CONFERRING EXCLUSIVE JURISDICTION ON THE UNITED STATES OVER CRIMES BY AN INDIAN AGAINST ANOTHER INDIAN ON AN INDIAN ALLOTMENT ARE CLEAR AND UNAMBIGUOUS.

The remainder of the brief of appellant (Br. pp. 15-36) consists of an effort to read into the foregoing Federal statutes something not appearing therein. If these statutes were ambiguous, which they are not, there might be justification for this effort. The statutes must, we submit, be applied in accordance with the clear and express language thereof. Tortured logic and speculation, however ingenious, cannot defeat the clear language of a statute:

- (1) Petitioner and the deceased were and are "Indians" within the meaning of the Federal statutes.

Appellant argues (Br. pp. 15-17) that Carmen and the deceased were "emancipated" and therefore not "Indians" within the meaning of the jurisdictional statutes.

There is nothing in any of the statutes which even refers to "emancipation". 18 U.S.C.A. Sec. 1153 includes "*any Indian*" and Section 3242 "*all Indians*". The only so-called "emancipation" found in any of our statutes appears in the present wording of the Dawes Act, (now 25 U.S.C.A. Sec. 349) in respect to Indian allottees, wherein it is expressly provided as follows:

"Provided further, that until the issuance of fee simple patents, all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States."

Thus, it has always been the rule that "emancipation" can come only through the grant of a patent in fee, as stated in *People v. Pratt*, 26 C.A. (2d) 618, 621.

The cases cited by appellant (Br. pp. 15-16) do not hold to the contrary, as demonstrated by the District Court (165 Fed. Supp. 946-948). The *Louie*, *Bush*, *Monroe*, *Nimrod*, and *Irvine* cases were all cases wherein a patent in fee had been issued. *Campbell*, *Livingstone*, and *Big Sheep* are inapplicable because they did not involve any of the ten major crimes. *Ketchum* did involve the major crime of murder, but, as the District Court pointed out, (p. 947) the crime was not committed on a reservation or elsewhere in Indian country. *Howard*, likewise, involved one of the ten major crimes, but the defendant was an Indian who was not a member of *any tribe*, unlike Carmen, who was found to be a member of the Mono Tribe. In discussing this case, the District Court (p. 947) states that it stands alone for even this limited holding, and appears to be contrary to the holding of this Court in *Davis v. United States*, 32 F. (2d) 860, to the effect that tribal relations have no bearing on an Indian's status within the meaning of the Ten Major Crimes Act.

The complete answer to appellant's argument lies in the findings of the referee. He found that both Carmen and McSwain were Indians by blood, enrolled as members of the Mono Tribe by the Bureau of Indian Affairs, who had received no allotment or patent in fee. Therefore, they could not be "emancipated". The District Court therefore held:

“Respondent has cited no cases, and there appear to be none, which suggest any method of emancipation which might except an Indian from the provisions of the Ten Major Crimes Act, other than the severing of all tribal relations or the obtaining of a fee patent to land allotted under the Dawes Act. Whether or not non-tribal Indians or Indians holding a fee patent to land allotted under the Dawes Act are subject to the Ten Major Crimes Act is unnecessary to decide. For there is no doubt that petitioner, who has received no allotment and is an Indian by blood, enrolled as a member of the Mono Tribe by the Bureau of Indian Affairs is an Indian subject to that Act.” (165 Fed. Supp. 948.)

- (2) All Indian allotments title to which is held in trust by the United States constitute “Indian country” over which there is exclusive Federal jurisdiction.

The Indian allotment which was the site of the crime for which Carmen was convicted was the Maggie Jim allotment, held in trust for a 25 year period by the United States. The Maggie Jim allotment came from lands in the public domain, to-wit, the Sierra National Forest. Appellant argues (Br. pp. 18-26) that such an allotment is not Indian country as defined by 18 U.S.C.A. Sec. 1151 because the allotment is not from an Indian reservation or from land of which the Indians have had uninterrupted use and occupancy.

The basis of this argument appears to be House Report No. 304, wherein it is stated that Indian allotments were included in the definition of Indian country on the authority of *United States v. Pelican*, 232 U.S. 442, 34 S. Ct. 396, 58 L. Ed. 676. In the *Pelican*

case an Indian was murdered on allotted land formerly part of the Colville Indian Reservation. This reservation had been restored to the public domain with the exception of certain 80-acre allotments title to which was held in trust by the United States government for 25 years. The District Court held that the allotment was not "Indian country" within the meaning of 18 U.S.C.A. Sec. 1151 as then written. The Supreme Court reversed this holding and said:

"Although the lands were allotted in severalty, they were to be held in trust by the United States for 25 years for the sole use and benefit of the allottee, or his heirs, and during this period were to be inalienable. That the lands, being so held, continued to be under the jurisdiction and control of Congress for all governmental purposes relating to the guardianship and protection of the Indians, is not open to controversy. *United States v. Rickert*, 188 U.S. 432. . . ." (p. 447)

That the Supreme Court in no way intended to confine Federal jurisdiction to Indian allotments from a particular source is shown by the fact that the reservation from which the allotment was made had itself been created out of the public domain rather than from land which had previously been in Indian possession, as pointed out by the District Court (165 Fed. Supp. 945) in this case. Moreover, the Supreme Court noted that in an earlier decision, *Donnelly v. United States*, 228 U.S. (Cal.) 243, 33 S. Ct. 449, 57 L. Ed. 820, it had been held that a reservation carved out of the public domain was just as much Indian country as a reservation created from land which had



always been occupied by Indians. In the *Donnelly* case the court said:

“In our judgment, nothing can more appropriately be termed ‘Indian country’, within the meaning of those provisions of the Revised Statutes that relate to the regulation of the Indians and the government of the Indian country than a tract of land that, being a part of the public domain, is lawfully set apart as an Indian reservation.” (p. 458)

In the present case, the land which was the site of the alleged crime was also a part of the public domain set aside for Indian use as an Indian allotment. The court in the *Donnelly* case on this point said:

“It is contended for plaintiff in error that the term ‘Indian country’ is confined to lands to which the Indians retain their original right of possession and is not applicable to those set apart to an Indian reservation out of the public domain and not previously occupied by the Indians.” (p. 457)

The court found against this contention.

On page 22 of his brief, appellant says that cases following *Pelican* require the same interpretation given by appellant. He cites the case of *State v. Muskrat*, 179 Minn. 180, 222 N.W. 611 (the correct title of this case is *People v. Cloud* and it appears in 228 N.W. 611). In this case the defendant, a Chipewewa Indian, and enrolled as such, had an 80 acre allotment. The land was held for him in trust by the United States. He took a muskrat in violation of the



state game laws. The defendant contended that while residing on the allotment during the trust period he was a ward of the United States and that the state had no jurisdiction over him for the offense charged. With this the court agreed, saying:

“Indians living on their reservations or on allotments held in trust for them by the United States under the allotment act are within the exclusive jurisdiction of the United States while on such reservation or allotment.”

Citing:

*U. S. v. Kagama*, 118 U.S. 375;

*U. S. v. Celestine*, 215 U.S. 278;

*U. S. v. Nice*, 241 U.S. 591.

That Section 1151 means what it says is conclusively shown by the terms of 25 U.S.C.A. Sec. 334, which provides for allotments to Indians “*not residing upon a reservation*, or for whose tribe no reservation has been provided by treaty, Act of Congress, or Executive Order. . . .” This statute was based on the original Dawes Act respecting allotments and provides “that patents shall be issued to them for such lands in the manner and with the restrictions as provided in Sections 348 and 349”. The statute is silent as to the *source* of the allotment, and treats all allotments alike regardless of source. Section 349 provides as follows:

“At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee as provided in section 348, then each and every allottee shall have the benefit of and be subject to the laws, both civil and crimi-

nal, of the State or Territory in which they may reside . . . *provided further, that until the issuance of fee simple patents all the allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States. . . .*"

The phrase "Indian titles to which have not been extinguished" in Section 1151 can have only one meaning. As above shown, 25 U.S.C.A. Section 334 et seq. provides that when the holder of the allotment has complied with all the trust provisions and the United States has given a patent thereto and has divested itself of all ownership, then, and only then, is the Indian title extinguished.

The leading authority on Indian law, Felix S. Cohen, in his "Handbook of Federal Indian Law", summarizes what constitutes "Indian country" as follows:

- "(1) Tribal land is considered Indian country for purposes of federal criminal jurisdiction.
- (2) An allotment held under patent in fee and subject to restraint against alienation is likewise considered Indian country for purposes of federal criminal jurisdiction.
- (3) *An allotment held under trust patent, with the title in the Government, is likewise considered Indian country during the trust period.*
- (4) Rights-of-way across an Indian reservation are considered 'Indian country' for some or all purposes of federal criminal jurisdiction." (p. 538)

Appellant's reference to Indian liquor legislation (Br. p. 26) directs our attention to Judge Goodman's analysis of such legislation, whereby he demonstrates that Federal jurisdiction over Indian allotments is inviolate *regardless of source* (165 Fed. Supp. 946).

We therefore conclude that Section 1151, in clear and unambiguous language, includes "all Indian allotments" within the definition of "Indian country" regardless of source.

(3) The federal statutes vest "exclusive" jurisdiction in the courts of the United States.

Appellant next argues that the statutes do not confer upon the United States exclusive jurisdiction (Br. pp. 27-29). He argues that California has at least concurrent jurisdiction (Br. pp. 29-30).

These contentions are in direct conflict with the clear and unambiguous language of the statutes. Thus, 25 U.S.C.A. Sec. 3242 expressly provides that all Indians committing any one of the ten major crimes within Indian country "shall be tried in the *same courts* and in the same manner, as are all other persons committing any of the above crimes *within the exclusive jurisdiction of the United States*".

Again, 25 U.S.C.A. Sec. 349, in reference to Indian allottees, provides:

"Provided further, that until the issuance of fee simple patents all allottees to whom patents shall be issued shall be subject to the *exclusive jurisdiction* of the United States."

This same argument was made by appellant before the District Court, and the court concluded:

“This contention is wholly untenable. The language of the Act which specifies that Indian offenders subject to the Act ‘shall be tried in the same courts, and in the same manner, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States’ clearly contemplates that Indian offenders shall be tried exclusively in the federal courts. *There are many cases that so hold, and none which hold to the contrary.*” (165 Fed. Supp. 948.)

The cases cited by the District Court are:

*Ex parte Pero*, 7 Cir., 1938, 99 F. (2d) 28;  
*Yohyowan v. Luce*, D.C. 1923, 291 F. 425;  
*State v. Pepion*, 1951, 125 Mont. 13, 230 P. (2d) 961;  
*State v. Columbia George*, 1901, 39 Or. 127, 65 P. 604;  
*People ex rel. Cusick v. Daly*, 1914, 212 N.Y. 183, 105 N.E. 1048;  
*State v. Condon*, 1914, 99 Wash. 97, 139 P. 871;  
*Ex parte Cross*, 1886, 20 Neb. 417, 30 N.W. 428;  
*State v. Campbell*, 1893, 53 Minn. 354, 55 N.W. 553, 21 L.R.A. 169.

To these cases, there might well be added *State ex rel. Irvine v. District Court*, 239 P. (Mont.) 272 where the court said:

“We should keep in mind that we are here dealing with federal laws, enacted by Congress in the interests and protection of the ‘nation’s wards’.



‘The authority of the United States Government is supreme in its cognizance of all subjects which the Constitution has committed to it. Consequently, there can be no conflict of authority, in the sense here given to the term between a state and a law of the United States in respect of such a matter, the former being always subordinate and the latter paramount. \* \* \* The states \* \* \* cannot invade a field which belongs exclusively to Congress. Likewise, where Congress has legislated upon a subject which is within its constitutional control and over which it has the right to assume exclusive jurisdiction and has manifested its intention to deal therewith in full, the authority of the states is necessarily excluded. \* \* \*’ (p. 278)

None of the cases cited by appellant are to the contrary. For example, *Ex parte Nowabbi* (Br. p. 27) was decided solely upon the exclusionary clause of 25 U.S.C.A. 349, excluding Indians residing in the former Indian Territory from Federal jurisdiction; and *State v. McAlhaney* (Br. p. 27) merely held that a white defendant was not within the purview of the Indian statutes.

Concurrent jurisdiction cases like *In re Dickson* and *California v. Zook* (Br. p. 30) have no application here since they apply only to those situations where Congress has not asserted exclusive Federal control.

We again refer to 18 U.S.C.A. Sec. 1162 passed by the 83rd Congress in 1953, where, *for the first time*, California was expressly given jurisdiction over crimes committed by or against Indians in the In-



dian country. Obviously, if the United States did not have exclusive jurisdiction prior to this time, there would have been no necessity to so provide.

- (4) The doctrine of *United States v. Kagama* was and is the law of the land, until Congress provides otherwise.

Finally, on pages 30 to 36 of his brief, appellant advances a strange argument: that the doctrine of wardship of the United States over the Indians enunciated by the United States Supreme Court in *United States v. Kagama*, 118 U.S. 375, 6 S. Ct. 1109, 30 L. Ed. 228, together with all applicable Federal statutes, should be disregarded and overthrown by this Court as obsolete.

The argument seems to be based on the idea that the diminution of Federal control over Indians and the grant of national and state citizenship to them abolishes their status as wards of the Federal government. Citizenship, however, has never been the basis of Federal guardianship over the Indian. As early as 1924 Congress specifically provided that Indians born in the United States are citizens of the United States (8 U.S.C.A. Sec. 1401). Therefore, all such Indians were and are citizens of the state in which they reside. (U. S. Constitution, Amendment XIV). Nevertheless, the United States Supreme Court has consistently held that the grant of citizenship in no way changed the status of the Indian as a ward of the Federal government:

*Board of Commissioners of Creek County v. Seber*, 1943, 318 U.S. 705, 718, 63 S. Ct. 920, 87 L. Ed. 1094;

*Tiger v. Western Investment Co.*, 1911, 221 U.S. 286, 31 S. Ct. 578, 55 L. Ed. 738;

*United States v. Celestine*, 1909, 215 U.S. 278, 30 S. Ct. 93, 54 L. Ed. 195.

As the District Court pointed out in this case:

“The (Supreme) Court has repeatedly stated that it rests with the Congress to determine when and how the national guardianship shall be brought to an end, and whether the emancipation shall at first be complete or only partial.” (Citing *Board of Commissioners of Creek County v. Seber*, 1943, 318 U.S. 705, 718, 63 S. Ct. 920, 87 L. Ed. 1094; *United States v. Nice*, 1915, 241 U.S. 591, 598, 36 S. Ct. 696, 60 L. Ed. 1192; *Tiger v. Western Investment Co.*, 1910, 221 U.S. 286, 310 et seq., 31 S. Ct. 578, 55 L. Ed. 738; *Perrin v. United States*, 1913, 232 U.S. 478, 34 S. Ct. 387, 58 L. Ed. 691; *United States v. Sandoval*, 1913, 231 U.S. 28, 34 S. Ct. 1, 58 L. Ed. 107; *United States v. Rickert*, 1903, 188 U.S. 432, 445, 23 S. Ct. 478, 47 L. Ed. 532.) (165 Fed. Supp. 948-949.)

It may be that Congress will decide at some time in the future that all American Indians have become so integrated in the life of their respective communities that all wardship should be terminated and jurisdiction over crime vested in the state courts. The facts remains, that in respect to California Indians, Congress did not make this determination until 1953, long after the commission of the crime here involved.

**CONCLUSION.**

In the early history of the western states, there was bitter conflict between native Indians and the first white settlers. The white man became master, but the bitterness persisted. Many statutes were passed denying Indians equal rights under the law. For example, in California, a white man could not be convicted of any offense upon the testimony of an Indian and Indian minors could be bound out to labor (Cal. Stats. 1850, p. 409; Cal Stats. 1853, p. 179). As a result, the American Indian became a ward of the United States (*United States v. Kagama, supra*), and, in the administration of its wardship, Congress passed the various statutes vesting exclusive jurisdiction over Indians in the Federal courts. These statutes remained in effect in California until 1953. Thus, Carmen, at the time of the alleged crime, was a ward Indian, and entitled to all the rights and benefits of the laws which Congress had enacted for the benefit of the Indians.

Dated, San Francisco, California,  
May 25, 1959.

Respectfully submitted,

MASON A. BAILEY,

LEONARD J. BLOOM,

*Attorneys for Appellee.*

No. 16186 ✓

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United States  
Court of Appeals  
for the Ninth Circuit

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AMERICAN MAIL LINE, LTD., a Corporation,  
Appellant,

vs.

TOKYO MARINE & FIRE INS. CO, LTD., a Corporation,  
Appellee.

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Transcript of Record

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Appeal from the United States District Court for the  
Western District of Washington,  
Northern Division.

FILED

DEC - 3 1958

PAUL P. O'BRIEN, CLERK





No. 16186

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**United States  
Court of Appeals**  
for the Ninth Circuit

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AMERICAN MAIL LINE, LTD., a Corporation,  
Appellant,

vs.

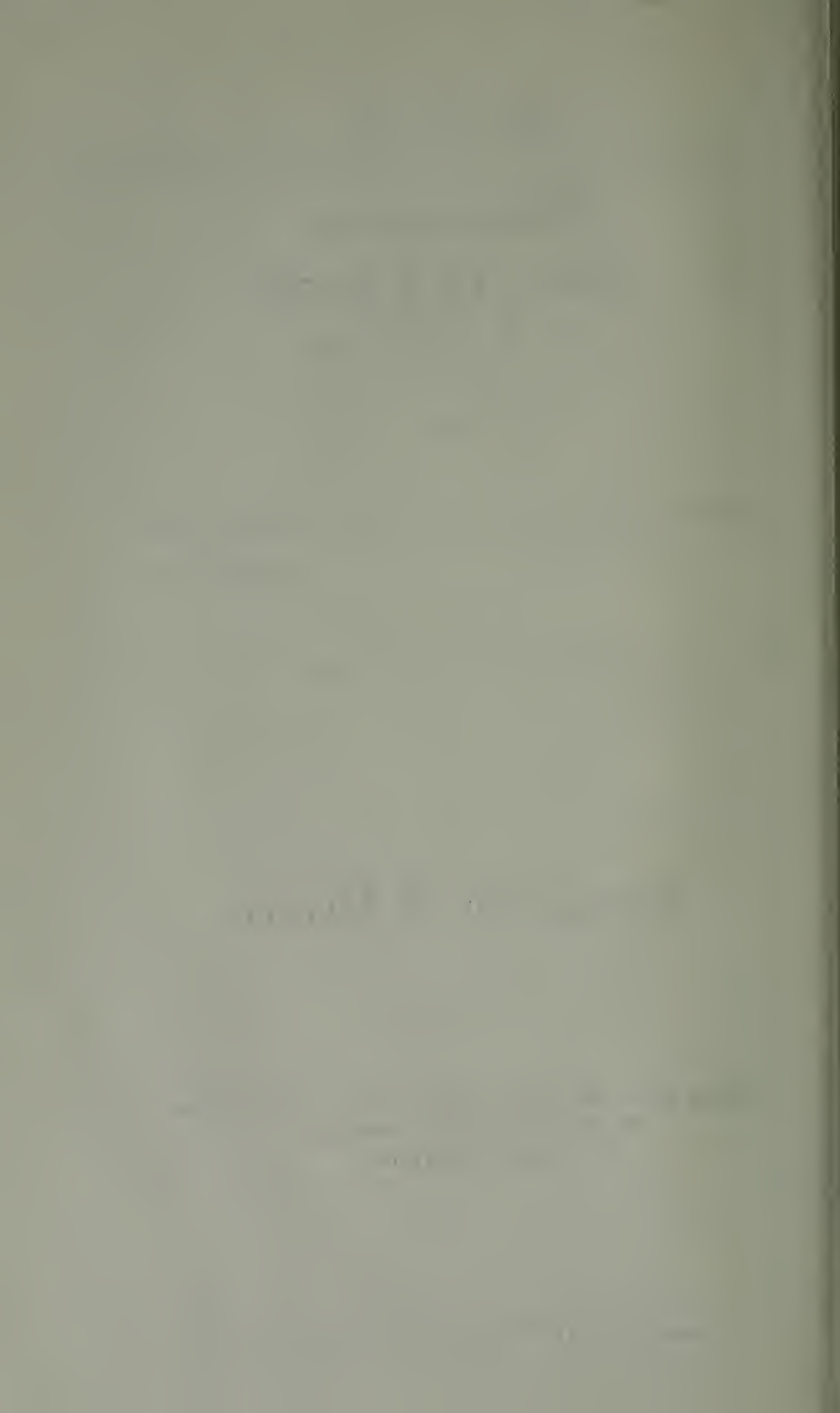
TOKYO MARINE & FIRE INS. CO, LTD., a Corporation,  
Appellee.

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Western District of Washington,  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF PROCTORS

MESSRS. BOGLE, BOGLE & GATES,  
Central Building,  
Seattle 4, Washington,  
Proctors for Appellant.

MESSRS. EVANS, McLAREN, LANE, POWELL  
& BEEKS,  
W. T. BEEKS,  
MARTIN P. DETELS, JR.,  
1111 Dexter Horton Bldg.,  
Seattle 4, Washington,  
Proctors for Appellee.





In the District Court of the United States for the  
Western District of Washington, Northern Division

In Admiralty No. 16232

TOKYO MARINE & FIRE INSURANCE, CO.,  
LTD., a Corporation,

Libelant,

vs.

AMERICAN MAIL LINE, LTD., a Corporation,  
Respondent.

### LIBEL

To the Honorable Judges of the Above-Entitled  
Court:

The Libel of Tokyo Marine & Fire Insurance  
Co., Ltd., against American Mail Line Ltd., in a  
cause of cargo loss, civil and maritime, respectfully  
alleges and shows:

#### I.

Libelant is now and was at all times hereinafter  
mentioned a corporation duly created, organized and  
existing under and by virtue of the laws of Japan  
with an office and place of business in the City of  
Tokyo, Japan, and was at all material times en-  
gaged in the business of marine insurance includ-  
ing the insuring of merchandise during sea transit.

#### II.

At all times herein mentioned, respondent was  
and now is a corporation organized under and  
existing by virtue of the laws of the State of Dela-

ware, with its principal office and place of business in the City of Seattle, State of Washington, within this District and Division; and was and is the owner and operator of the SS Oregon Mail, a general ship engaged in the transportation of cargo for hire between, among other places, the ports of Vancouver, Washington, and Shimizu, Japan.

### III.

On or about the 18th day of August, 1955, Powell Grain Co., Inc., as shipper, delivered to the respondent at the port of Portland, Oregon, 4,409,200 lbs. of No. 2 Rowed Western Barley in good order and condition to be loaded aboard the SS Oregon Mail and promptly carried to the port of Shimizu, Japan, and there discharged and delivered in the same good order and condition as when received, to the order of the shipper, notify F. Kanematsu & Co., Ltd., all in consideration of an agreed freight and in accordance with the terms of Bill of Lading No. VW-1-S, then and there duly issued by respondent to the shipper.

### IV.

Thereafter respondent's vessel SS Oregon Mail having on board the aforesaid shipment, sailed from the port of Vancouver, Washington, for the port, among others, of Shimizu, Japan. At said port of Shimizu, respondent failed to make delivery of the full quantity of barley received by respondent at the port of Vancouver, Washington, and shipped on board the SS Oregon Mail, but wholly failed to deliver to the owner thereof, either at that port or

at any other port or place, 844,031 lbs. of barley, comprising part of the aforesaid shipment.

### V.

Prior to the arrival of the SS Oregon Mail at Shimizu, Japan, F. Kanematsu & Co., Ltd., became the endorsee and holder of Bill of Lading VW-1-S, and the owner of the barley shipped thereunder. The agreed freight has been paid to respondent, and the shipper and F. Kanematsu & Co., Ltd., have performed all valid terms and conditions of said contract of carriage on their part to be performed.

### VI.

Libelant was at all material times the marine insurer of the shipment described and referred to in this Libel, and as such insurer was liable to the owner thereof for any loss or damage sustained by said shipment during the course of transportation from the port of Vancouver, Washington, to the port of Shimizu, Japan, on the SS Oregon Mail as aforesaid. In due course, libelant was called upon to pay and did pay to the owner of said shipment a claim for loss arising by reason of the failure of the vessel and respondent to make delivery at the port of Shimizu, Japan of 823,026 lbs. of barley from the shipment so insured and covered by the Bill of Lading issued as aforesaid; libelant thereby and thereupon became subrogated to the rights of the owner of said shipment in respect of said owner's claim against respondent for breach of the contract of carriage set forth above.

## VII.

By reason of the premises, libelant has sustained damage in the sum of U. S. \$26,065.06, no part of which has been paid by or on behalf of the respondent, although payment thereof has been duly demanded.

## VIII.

All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelant prays that process in due form of law according to the practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against respondent, American Mail Line, Ltd., citing it to appear and answer under oath all and singular the allegations aforesaid, and that respondent be decreed to pay libelant's damage in the amount of \$26,065.06 with interest thereon at the legal rate of six (6%) per cent per annum from the 16th day of September, 1955, together with libelant's costs of Court, and that libelant have such other and further relief as to the Court may seem just.

EVANS, McLAREN, LANE,  
POWELL & BEEKS,

/s/ W. T. BEEKS,

/s/ MORT P. DETELS, JR.,  
Proctors for Libelant.

Duly verified.

[Endorsed]: Filed August 22, 1956.

[Title of District Court and Cause.]

## ANSWER AND CROSS-LIBEL

Respondent for answer to the libel herein admits, denies and alleges:

### I.

Respondent does not have sufficient information to form a belief as to matters alleged in paragraph I of the libel and therefore requires strict proof thereof.

### II.

Respondent admits paragraph II of the libel.

### III.

Respondent admits paragraph III of the libel.

### IV.

Respondent admits paragraph IV of the libel.

### V.

Respondent does not have sufficient information to form a belief as to the matters alleged in paragraph V of the libel and therefore requires strict proof thereof.

### VI.

Respondent does not have sufficient information to form a belief as to the matters alleged in paragraph VI of the libel and therefore requires strict proof thereof.

### VII.

Respondent denies that libelant sustained loss or damage in the sum of \$26,065.06, and requires of



libelant strict proof as to the actual value of the aforesaid 844,031 pounds of barley said to be short in said shipment upon discharge at destination.

### VIII.

Further answering said libel respondent alleges:

1. That the said SS Oregon Mail sailed from the Port of Portland, Oregon on or about August 18, 1955, and thereafter loaded additional cargo at Longview, Washington, Vancouver, B. C. and Seattle, Washington, in the regular course of its voyage. That at the Port of Seattle, Washington on or about August 22, 1955, at about 12 o'clock, a smoldering fire was discovered in and burning the said shipment of bulk barley in No. 1 lower hold of the SS Oregon Mail. That said fire resulted from an electric flood light in the after port corner of the No. 1 lower hold hatch coaming which was turned on by mistake and left on, after the bulk barley had been loaded. That as a result a portion of the said bulk barley in No. 1 lower hold was burned, charred and smoke damaged to the extent of the 844,031 pounds alleged in the libel herein and said amount was thereafter discharged from said vessel at Seattle, Washington and not carried to destination.

2. That the bill of lading issued for the shipment referred to in the libel in paragraph 1 thereof is expressly made subject to the terms and conditions of the United States Carriage of Goods by Sea Act, 1936 (46 U.S.C. 1304) which provides in said Section 4(2)(b) as follows:

“(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from——

(b) fire, unless caused by the actual fault or privity of the carrier \* \* \*.”

3. That said fire and resulting damage to bulk barley was the sole cause and extent of loss or damage to the cargo which is the subject matter of the libel herein. That said fire was caused and resulted without any fault or privity of the respondent and that respondent is not therefore liable for such loss or damage.

#### IX.

Further answering said libel respondent alleges:

1. That the fire and all resulting loss and damage to libelant's shipment as set forth in paragraph VIII (1) above if resulting from any fault or negligence of the respondent or the said vessel was solely due to the fault or negligence of the officers or crew of the said vessel and that such negligence constituted faults or errors in navigation or in the management of the vessel for which respondent and the said vessel is excused from liability by virtue of Section 4(2)(b) of the United States Carriage of Goods by Sea Act, 1936 (46 U.S.C. 1304) to which said Act, said bill of lading is expressly made subject in paragraph I thereof and which provides as follows:

“(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from——

“(a) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship \* \* \*.”

## X.

Further answering said libel respondent alleges:

1. That as a result of said fire, burning, charring and heating of cargo on board the Oregon Mail involving a portion of the cargo of bulk barley which is the subject matter of the libel herein the respondent necessarily incurred certain reasonable General Average expenses in connection with extinguishing the fire and the discharging and re-loading of certain cargoes, all of which were necessary for the safety and preservation of the ship and cargo and for the completion of the venture which was completed and the cargo delivered, in an amount not now definitely determined and respondent also necessarily incurred certain reasonable and proper special charges in connection with said cargo covered under its bill of lading VW-1-S in an amount not now definitely determined for all of which expenses respondent became entitled to a lien upon said cargo covered under bill of lading VW-1-S for its proportionate contribution to the General Average expenditures and the payment of the special charges.

2. That respondent pursuant to the terms and conditions of said bill of lading VW-1-S in paragraph 10 thereof has declared a General Average

with respect to the matters herein alleged and that Horder, Jacobs & Speck, Inc., of Seattle, Washington have been appointed General Average adjusters and are now adjusting and settling the General Averages and the special charges with respect to all interests involved including the cargo covered under the aforesaid bill of lading VW-1-S, which is the subject matter of the libel herein. That the owner of said cargo heretofore and in consideration of the delivery of said cargo, executed a General Average agreement undertaking to pay such General Average contribution and special charges.

3. That said bill of lading VW-1-S contains among other provisions the following agreement in paragraph 10 thereof with respect to the General Average and special charges:

“In the event of accident, danger, damage or disaster, before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the carrier is not responsible, by statute, contract, or otherwise, the goods, shippers, consignees, or owners of the goods shall contribute with the carrier in General Average to the payment of any sacrifices, losses, or expenses of a General Average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods. \* \* \*”

4. That by virtue of the foregoing matters of General Average and special charges the owner of

said cargo being the libelant's assignor became and is indebted to respondent for the payment of a General Average contribution and of special charges in respect of said cargo, the exact amounts of which have not been finally determined and that when so determined respondent will ask leave of court to amend this answer to set forth said amounts. That no part of said General Average contribution or special charges has been paid the respondent in respect of and due from the cargo carried under bill of lading VW-1-S and libelant is liable therefor in such sum as is finally determined pursuant to the adjustment of the General Average and the statement of the special charges.

5. That in the event of any recovery in this cause on behalf of libelant respondent is entitled to offset all amounts found due for General Average and special charges in respect of the cargo covered under respondent's bill of lading VW-1-S.

Cross-Libel Against Libelant Tokyo Marine &  
Fire Insurance Co., Ltd., a Corporation

Respondent and Cross-libelant, American Mail Line, Ltd., for cross-libel herein against libelant and Cross-respondent, Tokyo Marine & Fire Insurance Co., Ltd., a corporation, respectfully alleges:

I.

Respondent realleges subparagraphs 1, 2, 3 & 4 of paragraph X of respondent's foregoing answer to



the libel and by reference fully incorporates the same herein.

II.

That cross-respondent and/or its assignor as owner of the cargo carried and delivered by cross-libelant on its vessel Oregon Mail under bill of lading VW-1-S heretofore and in consideration of the delivery of said cargo executed and delivered to cross-libelant a General Average agreement whereby it was agreed that General Average and special charges in respect of said cargo would be paid by cross-respondent and/or its assignor according to the General Average adjustment as finally issued by the adjuster of the General Average.

III.

That cross-respondent and/or its assignor is indebted to cross-libelant and to the General Average in the sum of the general average contribution and the special charges due from the cargo carried pursuant to said bill of lading VW-1-S in such sum as is hereafter finally determined to be due according to the General Average adjustment.

IV.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, respondent and cross-libelant pray as follows:

1. That the libel herein be dismissed with prejudice and that respondent recover its costs.

2. That in the event of any recovery by libelant, the amount determined to be due for general average contribution and for special charges in respect of such cargo be offset against libelant's recovery herein.

3. That cross-libelant have and recover from cross-respondent such amount as is finally determined by the General Average adjustment to be due from cross-respondent and/or its assignor for general average contribution and for special charges in respect of the shipment carried and delivered under cross-libelant's bill of lading VW-1-S.

4. That respondent and cross-libelant have and recover such other and further relief to which it may be entitled herein.

BOGLE, BOGLE & GATES,

/s/ CLAUDE E. WAKEFIELD,

/s/ M. BAYARD CRUTCHER,  
Proctors for Respondent.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed November 30, 1956.

[Title of District Court and Cause.]

## ANSWER TO CROSS-LIBEL

Libelant and cross-respondent, for answer to the cross-libel herein, admits, denies and alleges:

### I.

Answering Paragraph I of the cross-libel which incorporates the allegations of subparagraphs 1, 2, 3 and 4 of Paragraph X of respondent's answer to the libel, admits, denies and alleges as follows:

(1) Denies each and every allegation contained in subparagraph 1;

(2) Admits that respondent has declared a General Average, but denies that a General Average accident occurred and denies that a General Average was properly declared; admits that Horder, Jacobs & Speck, Inc., of Seattle, Washington have been appointed by respondent as General Average adjusters; admits that an Average Agreement was executed by F. Kanematsu & Co., Ltd., libelant's subrogor, which agreement was delivered to and is in the possession of respondent; and except as thus admitted, denies the allegations contained in said subparagraph;

(3) Admits the allegations of subparagraph 3;

(4) Denies each and every allegation contained in subparagraph 4.

## II.

Answering Paragraph II of the cross-libel, admits that an Average Agreement was executed by F. Kanematsu & Co., Ltd., the owner of the cargo, and delivered to cross-libelant, but denies each and every other allegation therein contained.

## III.

Answering Paragraph III, denies the same.

## IV.

Answering Paragraph IV, admits the admiralty and maritime jurisdiction of this Honorable Court, but except as thus admitted, denies each and every allegation therein contained.

Further Answering Said Cross-Libel, Cross-Respondent Alleges:

## I.

On information and belief, that cross-libelant took possession of a portion of the barley shipped under its bill of lading VW-1-S and sold the same for \$15,368.89, and now retains said proceeds of sale, no part of which has been paid to cross-respondent except the sum of \$9,328.89, which sum was paid on the 15th day of April, 1958, and that respondent, or its transferee or transferees, retains the balance of the proceeds from the sale of said barley.

Wherefore, libelant and cross-respondent prays as follows:

1. That the cross-libel herein be dismissed with prejudice and that cross-respondent recover its costs.

2. Repeats and by reference incorporates herein the prayer of its libel.

EVANS, McLAREN, POWELL  
& BEEKS,

/s/ W. T. BEEKS,

/s/ MARTIN P. DETELS, JR.,  
Proctors for Libelant.

Duly verified.

[Endorsed]: Filed May 5, 1958.

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[Title of District Court and Cause.]

### PRETRIAL ORDER

It appearing to the court that the parties have so stipulated, and the court having duly considered the pretrial stipulation of the parties, it is now

Ordered:

1. That the pretrial stipulation between the parties be and it is hereby adopted as the Pretrial Order of this Court.

2. It Is Further Ordered that the exhibits which have been identified and marked by proctors may be received in evidence if otherwise admissible with-



out further authentication, it being admitted that each is what it purports to be.

Done in Open Court this 6th day of May, 1958.

/s/ JOHN C. BOWEN,  
United States District Judge.

Approved and presented by:

/s/ MARTIN P. DETELS, JR.  
Of Proctors for Libelant.

/s/ M. BAYARD CRUTCHER,  
Of Proctors for Respondent.

[Title of District Court and Cause.]

### PRE-TRIAL STIPULATION

It Is Agreed between the parties as follows:

#### Libel

Respondent admits the allegations of Articles I and V. Respondent admits the allegations of Article VI, except the figure of 844,031 lbs., on page 3, line 6. The parties agree that the figure of 823,026 lbs. should be substituted in place of 844,031 lbs.

#### Answer and Cross-Libel

Libelant admits that it gave a general average agreement as alleged on page 4, at line 21, and that the copy thereof in possession of respondent is au-

thentic. Libelant agrees to accept a memorandum computation of general average charges and special average charges as sufficient amendment of the answer, page 5, paragraph 4.

### Expert Witnesses

Neither party to this suit will call more than three expert witnesses to express an opinion whether there was a fire in the barley; but this stipulation shall not preclude eyewitnesses from expressing their conclusions or opinions, if such evidence is otherwise admissible.

### Damages

The value of the barley described in the libel was \$62.29 per metric ton, cost and freight, plus cost of insurance at 20c per \$100 of invoice value. The total value of the 823,026 lbs. of barley not delivered to libelant's assured was \$23,301.43.

### Sale of Salvaged Barley, and Application of Proceeds of Salvage

The reasonable value of salvaged barley left at Seattle after the departure of the vessel was \$15,368.89. Of this amount, \$9,328.89 was delivered to libelant on April 15, 1958. The sum of \$3,540.00 is retained from the aforesaid gross salvage proceeds by Horder, Jacobs & Speck, Inc., average adjusters, as general average deposit for the account of libelant.

Dated at Seattle, Washington this 2nd day of May, 1958.

TOKYO MARINE & FIRE INSURANCE CO., LTD.,

By /s/ MARTIN P. DETELS, JR.,  
Of Its Proctors.

AMERICAN MAIL LINE, LTD.,

By /s/ M. BAYARD CRUTCHER,  
Of Its Proctors.

[Endorsed]: Filed May 6, 1958.

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In the District Court of the United States for the  
Western District of Washington, Northern  
Division  
No. 16232

TOKYO MARINE & FIRE INSURANCE CO.,  
LTD.,

Libelant,

vs.

AMERICAN MAIL LINE, LTD., a Corporation,  
Respondent.

Before Judge Bowen.

Friday, May 9, 1958

### COURT'S ORAL OPINION

The Court: From a preponderance of the evidence in this case the Court finds, concludes and decides as follows:

That this barley was set afire by the improper and negligent burning and use of an electric cargo light whose light rays were directed into the number one hold where this barley was stowed;

That the starting of that fire and its continuing to burn until the vessel arrived in Seattle were the result of negligent acts on the part of members of the ship's crew, in respect to which the respondent as the vessel's owner and operator was not in privity;

That such negligence on the part of the crew members and that fire continued until the vessel arrived in Seattle on the 21st day of August, 1955, after the fire had started in the barley on board the ship on the Columbia River on August 20, 1955, for all of which negligence on the part of such crew members prior to the arrival of the vessel in Seattle on August 21, 1955, the respondent was not and is not in privity.

The Court is clearly convinced by such evidence and by the preponderance thereof that this barley was on fire, that there was a fire in the barley cargo, from the time smoke was first indicated on August 20th. That was shown by the condition of the samples of the barley taken, it is shown by the long continuing emanations of smoke and the registration of smoke on the smoke indicators from the beginning, it is demonstrated by the great amount of heat that was in the samples of the crackling and burning barley taken in buckets out

of the hold of the ship later on at Seattle. No one who has seen burned grain could mistake for any other kind of evidence the scorched fire burned appearance of the samples of the barley in evidence here, as such appearance clearly indicates fire as the cause of the damage to the barley;

That the respondent was, after the ship's arrival in Seattle, guilty of negligent conduct in not properly protecting the cargo in that vessel, in that the respondent's Port Captain, Captain Greenwood, delayed for an unreasonably long time in the use and application to the fire and the area of the fire of CO<sub>2</sub>;

That, as disclosed by such evidence, the fire was immediately brought under control by the first use of CO<sub>2</sub>. That first use was made in the early morning about 3:00 a.m. on August 24, 1955, and accomplished the results which any prudent person would have in the exercise of due and ordinary care accomplished by similar methods within the first twenty-four hours of the ship's arrival in Seattle, which arrival date was the 21st of August, but on every day thereafter the respondent through its Port Captain, Captain Greenwood, neglected to employ CO<sub>2</sub> as a firefighting and smothering agent, and was negligent, for all of which negligence of Captain Greenwood after the vessel arrived in Seattle the respondent is in privity with him and is liable;

That the libelant, representing the cargo interests respecting the amount of damage sustained by the



cargo on account of this fire, is entitled to recover for the amount prayed for in the libel without any general average deduction in the sum of \$3,540 or any other related deduction, plus a certain interest item on \$9,328, as to which interest item just specified Counsel for both sides have stated their approval.

Libelant is also entitled to recover from respondent as requested in the libel including taxable costs.

Is there any issue not decided by what the Court has said?

(No response.)

[Endorsed]: Filed May 21, 1958.

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[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Cause having come on duly and regularly for trial on the 6th day of May, 1958, and having continued to the 9th day of May, 1958, at Seattle, Washington, before the Honorable John C. Bowen, United States District Judge; libelant appearing by its proctors, Messrs. Evans, McLaren, Lane, Powell & Beeks and Martin P. Detels, Jr., and respondent appearing by its proctors, Messrs. Bogle, Bogle & Gates, M. Bayard Crutcher and Donald McMullen, and witnesses having been sworn and examined, and evidence, both oral and documentary,

having been introduced, and the cause submitted to the Court for decision, and the Court having considered said evidence and having heard oral argument of counsel and being fully advised in the premises, the Court does now make the following:

### Findings of Fact

#### I.

At all times herein mentioned, Tokyo Marine & Fire Insurance Co., Ltd. was and now is a corporation duly created, organized and existing under and by virtue of the laws of Japan, with an office and place of business in the City of Tokyo, Japan, and was and is engaged in the business of marine insurance, including the insuring of merchandise during sea transit.

#### II.

At all times herein mentioned, respondent American Mail Line, Ltd., was and now is a corporation organized under and existing by virtue of the laws of the State of Delaware, with its principal office and place of business in the City of Seattle, Washington, and was and is the owner and operator of the SS Oregon Mail, a general ship engaged in the transportation of cargo for hire between, among other places, the ports of Vancouver, Washington and Shimizu, Japan.

#### III.

On or about the 17th day of August, 1955, Powell Grain Co., Inc., as shipper, delivered to respondent at the port of Vancouver, Washington, 4,409,200

pounds of #2 Two Rowed Western Barley in good order and condition, to be loaded aboard the SS Oregon Mail and promptly carried to the port of Shimizu, Japan, and there discharged and delivered in the same good order and condition as when received, to the order of the shipper, notify F. Kane-matsu & Company, Ltd., all in consideration of an agreed freight and in accordance with the terms of its On Board Bill of Lading No. VW-1-S then and there duly issued by respondent to the shipper, a copy of which was introduced in evidence herein as libellant's Exhibit No. 6.

#### IV.

Thereafter, respondent's vessel SS Oregon Mail, having on board the aforesaid shipment, sailed from the port of Vancouver, Washington, for the port, among others, of Shimizu, Japan. At said port of Shimizu, respondent failed to make delivery of the full quantity of barley received by respondent at the port of Vancouver, Washington, and shipped on board the SS Oregon Mail, but wholly failed to deliver to the owner thereof, either at that port or at any other port or place, 823,026 pounds of said barley, comprising part of the aforesaid shipment. The value of the barley shipped under respondent's Bill of Lading No. VW-1-S was \$62.29 per metric ton, cost and freight, plus cost of insurance at \$0.20 per \$100.00 of invoice value. The total value, cost, insurance and freight, of the 823,026 pounds of barley not delivered was \$23,301.43.

## V.

Prior to the arrival of the SS Oregon Mail at Shimizu, Japan, F. Kanematsu & Company, Ltd. became the endorsee and holder of Bill of Lading VW-1-S and the owner of the barley shipped thereunder. The agreed freight has been paid to respondent, and the shipper and F. Kanematsu & Company, Ltd. have performed all valid terms and conditions of said contract of carriage on their part to be performed.

## VI.

Libelant Tokyo Marine & Fire Insurance Co., Ltd., was at all material times the marine insurer of the shipment described and referred to herein, and as such insurer was liable to the owner thereof for all loss or damage sustained by said shipment during the course of transportation from Vancouver, Washington, to Shimizu, Japan, on respondent's vessel the SS Oregon Mail. In due course, libelant was called upon to pay and did pay to the owner of said shipment a claim for loss arising by reason of the failure of the vessel and respondent to make delivery of 823,026 pounds of barley from the shipment so insured and covered by Bill of Lading VW-1-S. Libelant thereby and thereupon became subrogated to the rights of the owner of said shipment in respect of said owner's claim against respondent for breach of the contract of carriage set forth above.

## VII.

A portion of the barley shipped under Bill of Lading VW-1-S was loaded in bulk into the No. 1

hatch of the Oregon Mail. The No. 1 lower hold was filled with said barley, and the loading continued into the No. 1 lower 'tween deck to a height of approximately five feet, the lower 'tween deck hatch covers not having been replaced. The No. 1 lower hold of the SS Oregon Mail was equipped with fixed electric cargo lights, situated in the area of the corners of the hatch opening and fastened to the overhead main beams, on the ceiling. Said lights are controlled from a switch panel located in the No. 1 resistor house, on the forward deck of the vessel between the No. 1 and No. 2 hatches. Said fixed electric cargo lights in the No. 1 lower hold were improperly and negligently turned on or permitted to remain burning after the loading of bulk barley into the No. 1 lower hold of the SS Oregon Mail had commenced, by the negligent act or omission of the ship's officers and crew.

#### VIII.

The SS Oregon Mail is equipped with a smoke-detecting apparatus, which draws samples of air from the various compartments of the vessel, including the No. 1 lower hold, into the smoke-detector cabinet which is situated in the wheelhouse or bridge. On the evening of August 20, 1955, the vessel being then at Vancouver, B. C., smoke was observed in the smoke-detector cabinet coming from the suction line for the No. 1 lower hold; that at the same time a suspicious odor was detected in the area in which the air from the detector was exhausted; that the vessel's officers then made a search of the accessible spaces of the vessel, and were able to enter all



compartments, except the No. 1 lower hold, which was filled with barley; that upon entering the No. 1 resistor house, the Chief Officer examined the switch panel and found the fuses in place and the switch which controlled the cargo lights in the No. 1 lower hold was on; that no indication of any heat, smoke, odor, or fire was discovered in relation to any compartment of the vessel except the No. 1. lower hold.

### IX.

On August 21, 1955, at about 7:00 A.M., the SS Oregon Mail arrived at the port of Seattle, Washington. At that time the odor of smoke was more pronounced in the area of the smoke detecting apparatus, the registration of smoke on the apparatus continued, and smoke was reported coming out of the exhaust vent for the No. 1 hold, situated on the port king post located immediately aft of the No. 1 hatch. The Master of the vessel then called Captain Harry Greenwood, Port Captain for respondent, and reported a suspected fire in the No. 1 lower hold. Captain Greenwood in turn called certain surveyors, including Mr. James Gow, to attend aboard the vessel with him, in representation of the interests of respondent American Mail Line, Ltd., and a further examination of the vessel, including the smoke detector cabinet and exhaust vents for the No. 1 lower hold, was made. At the conclusion of said examination it was determined by Captain Greenwood and the Master of the Oregon Mail that the vessel would continue with the loading of cargo, including cargo to the No. 1 hold, but that a continu-

ous watch would be maintained on the smoke detecting apparatus.

### X.

On August 22, 1955, the loading of cargo, including cargo to the No. 1 hold, was continued. At 1:00 P.M. on that date the discharge of cargo from the No. 1 hold was begun to permit observation of the barley stowed in that compartment, and the discharge of cargo from the No. 1 hold of the vessel was continued to the early morning of August 24. At or about 3:05 A.M., August 24, 1955, the use of CO<sub>2</sub>, as a smothering agent, was begun, and CO<sub>2</sub> was introduced into the No. 1 lower hold of the vessel by means of the ship's fixed CO<sub>2</sub> system and a portable CO<sub>2</sub> system rigged on the main deck at the No. 1 hatch, and was continued at intervals on August 24, 1955, and into August 25, 1955.

### XI.

On August 25, 1955, following the employment of CO<sub>2</sub>, the No. 1 hatch was uncovered and barley was discharged from the square of the hatch to at or below the level of the hatch coaming in the No. 1 lower hold; samples of the damaged barley were removed from the No. 1 lower hold, at which time crackling was heard in the barley, which contained a great amount of heat. A sample of the scorched barley was introduced in evidence as libelant's Exhibit No. 2.

### XII.

The Court finds and concludes, by the preponderance of the evidence, from the condition and

scorched, fire-burned appearance of libelant's Exhibit No. 2, from the long continuing emanations of smoke and the registration of smoke on the detection apparatus, beginning August 20, 1955, and from the great amount of heat in the crackling barley taken in buckets out of the hold on August 25, 1955, that there was a fire in the barley cargo, which fire existed from the time smoke was first observed on August 20, 1955. The barley was set afire as a proximate result of acts and omissions of the officers and crew of the SS Oregon Mail in the negligent care and custody of the cargo in respect to the negligent burning and use of the electric cargo lights in the No. 1 lower hold of the vessel.

### XIII.

The Court further finds and concludes, by a preponderance of the evidence, that respondent was, after the ship's arrival in Seattle on the morning of August 21, 1955, guilty of negligent conduct in not properly protecting the said barley, in that the respondent's Port Captain delayed for an unreasonably long time in the use and application of CO<sub>2</sub>. The first application was made about 3:00 A.M. on August 24, 1955, and the fire was promptly brought under control. Such use of CO<sub>2</sub> accomplished results which any prudent person would, in the exercise of due and ordinary care, have accomplished by similar methods within 24 hours of the ship's arrival at Seattle, under the circumstances existing and known to respondent's Port Captain on August 21, 1955, or which, in the exercise of due care, he could

have learned. At all times thereafter that respondent, through its Port Captain, neglected to employ CO<sub>2</sub> as a firefighting and smothering agent, respondent was negligent. Such negligence and fault of respondent's Port Captain is the negligence and fault of respondent. Such negligence of the respondent was a proximate cause of the damage to the said barley.

#### XIV.

Respondent, in reliance on the provisions of paragraph 10 of its Bill of Lading, as set forth in libelant's Exhibit No. 6 herein, declared a general average with respect to the expense incurred at Seattle, in the loading and reloading of cargo, and application of CO<sub>2</sub>, and appointed Horder, Jacobs & Speck, Inc., of Seattle, Washington, to adjust and settle said general average. Said general average statement had not been completed at the time of trial, but libelant's liability for general average contribution as finally determined according to the General Average Statement was placed in issue by respondent's Cross-Libel herein.

#### XV.

823,026 pounds of damaged barley shipped under Bill of Lading VW-1-S were removed from the No. 1 hold of the Oregon Mail and sold by respondent for \$15,368.89, which is agreed by the parties to be the reasonable value of said damaged barley. In connection with the salvage and sale of said barley, respondent incurred expenses of \$1,490.84, which expenses are agreed by the parties to be reasonable



and proper salvage expenses. On April 15, 1958, respondent paid to libelant, without prejudice to any issue in this proceeding, except the amount of recovery, if any, to libelant, the sum of \$9,328.89. At the time of trial herein, Horder, Jacobs & Speck, Inc., held the sum of \$3,540.00 as a general average deposit for the account of libelant, pending settlement of the general average statement and determination of libelant's liability for general average contribution. At the conclusion of trial, proctor for respondent orally confessed judgment for the sum of \$1,009.16, being the balance of proceeds from the sale of the damaged barley after deduction of the following items: (1) the general average deposit in the amount of \$3,540.00; (2) \$9,328.89 heretofore paid to libelant; and (3) \$1,490.84 salvage expense, together with interest at the rate of 6% per annum on the sum of \$9,328.89 from September 16, 1955, when the balance of the barley shipped under Bill of Lading VW-1-S was delivered at destination, to April 15, 1958.

## XVI.

The transcript of the Court's oral opinion filed herein May 21, 1958, is hereby made a part of these findings and conclusions.

From the Foregoing Findings of Fact, the Court  
Makes the Following:

## Conclusions of Law

### I.

This Court has jurisdiction of the subject matter of this action in Admiralty.



## II.

823,026 pounds of barley shipped aboard respondent's vessel SS Oregon Mail under its Bill of Lading VW-1-S, and having a value, cost, insurance, and freight of \$23,301.43, were not delivered to the owner and endorsee of said Bill of Lading upon the arrival of said vessel at destination on September 16, 1955. Libelant was the insurer of said shipment and is subrogated to the rights of the owner and endorsee of said Bill of Lading against respondent for loss or damage to said shipment.

## III.

Said 823,026 pounds of barley were not delivered by reason of having been damaged by fire while aboard respondent's vessel SS Oregon Mail, between the dates of August 20, and August 25, 1955. The fire was caused by negligence of the officers and crew of the vessel. Respondent, through its Port Captain, was guilty of negligence and at fault and in privity, in delaying, after the arrival of the vessel at Seattle, Washington, on August 21, 1955, when said fire had already begun, for an unreasonably long time, in the use and application of CO<sub>2</sub> to the fire. By reason of said fault and privity on the part of respondent, respondent is not excused from liability for non-delivery of the 823,026 pounds of barley, by virtue of the provisions of Section 4(2)(b) of the Carriage of Goods by Sea Act, 1936 (46 U.S.C. 1304 (2)(b)).

## IV.

The negligence of the officers and crew of the SS Oregon Mail in the burning and use of the electric cargo lights in the No. 1 lower hold of the vessel in the course of transportation of said barley therein was negligence in the care and custody of the cargo, for which respondent is not excused by virtue of the provisions of Section 4(2)(a) of the Carriage of Goods by Sea Act, 1936 (46 U.S.C. 1304 (2) (a)).

## V.

As a proximate result of the non-delivery of 823,-026 pounds of barley, libelant's subrogor was damaged in the amount of \$23,301.43, of which respondent has heretofore, on April 15, 1958, paid to libelant \$9,328.89.

## VI.

Libelant is entitled to recover of and from the respondent the sum of \$13,972.54, with interest at the rate of 6% per annum from September 16, 1955, to and including May 21, 1958, in the amount of \$2,247.24, together with interest at the rate of 6% per annum on the sum of \$9,328.89 from September 16, 1955, to and including April 15, 1958, in the sum of \$1,445.98, together with its taxable costs herein in the amount of \$173.08, said recovery to bear interest at the rate of 6% per annum until paid, and that the libelant shall have execution therefor.

## VII.

The Cross-Libel of American Mail Line, Ltd., should be dismissed.

Done in Open Court this 21st day of May, 1958.

/s/ JOHN C. BOWEN,

United States District Judge.

Presented as in conformity with the Court's Oral  
Decision and Approved as to form by:

/s/ MARTIN P. DETELS, JR., of  
EVANS, McLAREN, LANE,  
POWELL & BEEKS,  
Proctors for Libelant.

Copy received:

/s/ M. BAYARD CRUTCHER, of  
BOGLE, BOGLE & GATES,  
Proctors for Respondent.

[Endorsed]: Filed May 21, 1958.

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United States District Court, Western District  
of Washington, Northern Division

In Admiralty No. 16232

TOKYO MARINE & FIRE INSURANCE CO.,  
LTD., a Corporation,

Libelant,

vs.

AMERICAN MAIL LINE, LTD., a Corporation,

Respondent.

### DECREE

This Cause having heretofore come on trial before  
the undersigned Judge of the above-entitled Court

on May 6, 1958, both parties being then present through their respective proctors of record, and witnesses having been sworn and examined, and evidence introduced by each of the parties, and the Court having duly considered the same, and arguments and briefs of counsel, and being fully advised in the premises, and having made and entered the Court's Findings of Fact and Conclusions of Law pursuant to the decision of the Court rendered upon the conclusion of the trial of this cause, finding and concluding that libelant was entitled to recover of and from respondent the sum of \$13,972.54 with interest at the rate of 6% per annum from September 16, 1955, to and including May 21, 1958, in the amount of \$2,247.24, in addition to an item of interest at the rate of 6% per annum on the sum of \$9,328.89 from September 16, 1955, to and including April 15, 1958, in the sum of \$1,445.98, together with libelant's taxable costs herein in the sum of \$173.08, it is now, therefore,

Ordered, Adjudged and Decreed as follows:

1. That the libelant, Tokyo Marine & Fire Insurance Co., Ltd., recover herein against respondent American Mail Line, Ltd., the sum of \$13,972.54, together with interest in the sum of \$2,247.24, together with the further sum of \$1,445.98 as interest on the amount heretofore paid by respondent to libelant, and the further sum of \$173.08, costs as taxed, making in all the sum of \$17,838.84, said recovery to bear interest at the rate of 6% per annum from the date of entry of this decree until paid.

2. That unless this decree be satisfied or proceedings thereon stayed within thirty days after entry of this decree, libelant shall have execution against respondent and its stipulator, their goods, chattels and lands, forthwith to satisfy this decree.

3. That the Cross-Libel of American Mail Line, Ltd., against Tokyo Marine & Fire Insurance Co., Ltd., be and the same is hereby dismissed with prejudice.

Done in Open Court this 21st day of May, 1958.

/s/ JOHN C. BOWEN,  
United States District Judge.

Approved and Presented by:

/s/ MARTIN P. DETELS, JR., of  
EVANS, McLAREN, LANE,  
POWELL & BEEKS,  
Proctors for Libelant.

Copy Received.

[Endorsed]: Filed May 21, 1958.

Entered: May 22, 1958.

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[Title of District Court and Cause.]

COST BOND ON APPEAL AND  
SUPERSEDEAS BOND

Know All Men by These Presents:

That the undersigned, American Mail Line, Ltd., a corporation, as principal, and Fireman's Fund



Indemnity Company, a corporation organized under the laws of the State of California and authorized to transact business as surety in the State of Washington, as Surety, are held and firmly bound unto Tokyo Marine & Fire Insurance Co., Ltd., a corporation, libelant in the above matter, in the penal sum of Seventeen Thousand Five Hundred (\$17,500) Dollars, lawful money of the United States, for the payment of which, well and truly to be made, the said principal and the said surety bind themselves, their successors and assigns, jointly and severally, firmly by these presents.

Signed, Sealed and Executed this 22nd day of July, 1958.

Whereas, the above-named respondent and principal is in the process of appealing to the United States Court of Appeals for the Ninth Circuit from a decree of the District Court of the United States for the Western District of Washington, Northern Division, bearing date 21st day of May, 1958, in a suit in which Tokyo Marine & Fire Insurance Co., Ltd., a corporation, is libelant and American Mail Line, Ltd., a corporation, is respondent, which decree orders the said respondent to pay libelant the sum of \$17,838.84; and whereas, respondent has paid into Court the sum of \$2,616.74 in partial satisfaction of said decree; and whereas, said respondent desires, during the progress of such appeal, to stay the execution of the said decree of the District Court:

Now, Therefore, the condition of this obligation is such that if the above-named respondent, American Mail Line, Ltd., shall prosecute said appeal with effect and pay all costs which may be awarded against it as such appellant if the appeal is not sustained, and shall abide by and perform whatever decree may be rendered by the United States Court of Appeals for the Ninth Circuit in this cause, or on the mandate of said Court by the Court below, then this obligation shall be void, otherwise, the same shall be and remain in full force and effect.

AMERICAN MAIL LINE, LTD.,  
A Corporation;

BOGLE, BOGLE & GATES,  
By /s/ CLAUDE E. WAKEFIELD,  
Its Attorneys.

[Seal] FIREMAN'S FUND  
INDEMNITY COMPANY,  
By /s/ CLAUDE E. WAKEFIELD,  
Its Attorney in Fact.

The above Cost Bond and Supersedeas Bond is hereby approved.

Done in Open Court this 24th day of July, 1958.

/s/ JOHN C. BOWEN,  
District Judge.

Presented by:

/s/ DONALD McMULLEN.

Approved as to form and amount of bond:

/s/ MARTIN P. DETELS, JR.,  
Proctor for Libelant.

[Endorsed]: Filed July 24, 1958.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that American Mail Line, Ltd., respondent above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final decree entered in this cause on the 21st day of May, 1958, excepting that part of the decree which allows libelant sums for which respondent confessed judgment at time of trial, more particularly, the sum of \$1,445.98 as interest mentioned in paragraph 1, and the sum of \$1,009.16 as balance of proceeds mentioned in Findings of Fact XV made and entered by the Court in this cause on the same date, with interest thereon.

Dated August 12, 1958.

BOGLE, BOGLE & GATES,  
/s/ M. BAYARD CRUTCHER,  
/s/ DONALD McMULLEN,  
Proctors for Appellant  
American Mail Line, Ltd.

Receipt of copy acknowledged.

[Endorsed]: Filed August 12, 1958.

In the District Court of the United States for  
the Western District of Washington, Northern  
Division

No. 16232

TOKYO MARINE & FIRE INSURANCE CO.,  
LTD., a Corporation,

Libelant,

vs.

AMERICAN MAIL LINE, LTD., a Corporation,

Respondent.

### STATEMENT OF FACTS

Be It Remembered, that the above-entitled and  
numbered cause was head before the Honorable  
John C. Bowen, a Judge of the above-entitled Court  
sitting in Department No. 1 thereof without a jury,  
beginning Tuesday, May 6, 1958, at 11:45 o'clock  
a.m.

The Libelant was represented by Mr. Martin P.  
Detels, Jr., of Messrs. Evans, McLaren, Lane,  
Powell and Beeks, Attorneys at Law.

The respondent was represented by Mr. M. Bayard  
Crutcher and Mr. Donald McMullen, of Messrs.  
Bogle, Bogle and Gates, Attorneys at Law.

Whereupon, the following proceedings were had  
and done, to wit: [1\*]

\* \* \*

Mr. Detels: If the Court please, the libelant's  
case in chief is established by admissions contained

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\*Page numbering appearing at foot of page of original Reporter's  
Transcript of Record.

in the pleadings or in the stipulation of Counsel, and unless the Court wishes me to do so I will not read the pleadings and admissions. [9]

\* \* \*

### NORMAN LEWIS TOMLIN

called as a witness in behalf of respondent, being first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Crutcher:

Q. Will you please state your full name and spell your last name for the Court?

A. Norman Lewis Tomlin, T-o-m-l-i-n.

Q. Where is your home address?

A. 7406 Tacoma Avenue South, Tacoma.

Q. What is your occupation?

A. Second officer on the SS Oregon Mail.

Q. And is that vessel presently in Seattle?

A. Yes.

Q. Is it scheduled to sail tonight? A. Yes.

Q. Now, Mr. Tomlin, how long have you been in the merchant [17] marine?

A. Fifteen years.

Q. And have you held licenses issued by the United States Coast Guard as a deck officer?

A. Yes.

Q. Would you tell the Court briefly what those licenses were?

A. Third mate, second mate and chief mate.

Q. In 1955 were you second officer on board the



(Testimony of Norman Lewis Tomlin.)

SS Oregon Mail? A. Yes.

Q. And were you second officer on Voyage 33 commencing at the port of Portland, Oregon, about August 13, 1955? A. Yes.

Q. Were you present on board the vessel at the port of Vancouver, Washington, when barley was loaded to the vessel approximately August 18, 1955?

A. Yes.

Q. In which hold was that cargo loaded?

The Court: If you know. He has not said that he knew or anything about that in his former answers.

Q. (By Mr. Crutcher): Did you personally know what cargo activities were going on aboard the vessel while it was at Vancouver, Washington?

A. Yes. [18]

Q. In that connection what generally are the duties of the deck officer, or I should say the second officer, while a vessel is in port loading cargo?

A. In general to assist the chief officer in the cargo loading and follow his instructions as to special cargo and loading conditions.

Q. Did you receive any instructions at that port while that cargo was being loaded concerning fuses in the lights to the number one hold? A. Yes.

Q. Would you tell the Court what those instructions were?

A. To remove the fuses due to the grain, or whatever you call it, grain cargo, barley, being loaded in number one lower hold.

Q. Which fuses are those, Mr. Tomlin?

(Testimony of Norman Lewis Tomlin.)

A. To the lights in the lower hold.

Q. Now, can you state what the practice is aboard American Mail Line vessels with respect to the removal of fuses?

A. Well, when wheat or grain cargo is loaded of any type we remove the fuses to eliminate the fire hazard.

Q. Well, how does that eliminate fire hazard?

A. By having someone on board that could possibly turn the switches on, the lights, and the lights would be right against the cargo and cause enough heat to start a fire.

Q. And what does the removal of the fuses accomplish? [19]

A. It eliminates the chance of anyone turning the switches on. They can still turn the switches on but they can't—there will be no juice going to the hatch.

Q. Can you state whether you know of the general practice in the American merchant marine in this respect?

A. The general practice is to remove the fuses as we did.

Q. Has that practice prevailed as long as you have been in the merchant marine? A. Yes.

Q. Incidentally, how long have you worked for American Mail Line? A. Since 1943.

Q. In the course of that have you had occasion to carry other grain cargoes? A. Yes.

Q. Is that a regular trade of American Mail Line? A. Yes, it is.

(Testimony of Norman Lewis Tomlin.)

Q. Were you on board the SS Oregon Mail on the 20th of August, 1955? A. Yes.

Q. Where was the vessel at that time?

A. Oh, I'd have to refresh my memory on that.

Q. Could you do so by referring to the rough deck log book? A. Yes. [20]

\* \* \*

(A log book was marked Respondent's Exhibit No. A-1 for identification.)

Q. (By Mr. Crutcher): Mr. Tomlin, the bailiff is handing you a book which purports to be a log book for the SS Oregon Mail which has been marked for identification as Respondent's Exhibit A-1. Will you please tell the Court what that book is?

A. That's the rough log of the Oregon Mail for Voyage 33.

Q. Can you personally identify it of your own knowledge? A. Yes.

Q. And is that a book which is kept in the regular course of the ship's business?

A. Yes. [21]

\* \* \*

Q. (By Mr. Crutcher): And will you tell the Court where the vessel was on the 20th of August, 1955? A. At what time is that?

Q. Well, just during that day.

A. Yes, that was Vancouver.

Q. Was that Vancouver, British Columbia?

(Testimony of Norman Lewis Tomlin.)

A. Yes.

Q. Now, during the course of that day did you have occasion to look at the smoke detector in the pilot house?      A. Yes.

Q. Will you tell the Court what you observed?

A. A slight——

Q. Or excuse me, I'll withdraw that question. First of all, about what time was that, Mr. Tomlin?

A. That was at 1800.

Q. Would that be 6:00 o'clock in the evening?

A. 6:00 p.m., yes.

The Court: I would like to know what year that August 20th was.

A. 1955.

The Court: You may inquire.

Q. (By Mr. Crutcher): Now will you tell the Court what you observed on that occasion?

A. Slight smoke coming from the smoke detector in the [22] bridge, wheelhouse.

Q. Now, was that coming from a particular unit within the smoke detector system?      A. Yes.

Q. Which unit was it?

A. The Rich audio fire detecting system.

Q. Well, did it indicate smoke coming from a particular area on the vessel?      A. Yes.

Q. Which area was that?

A. Number one lower hold.

Q. What did you do after you noticed this phenomenon in the smoke detector cabinet?

A. I notified the chief mate and captain.

Q. Who was the chief mate?

(Testimony of Norman Lewis Tomlin.)

A. That was Rodney Palmer.

Q. And who was the master?

A. Captain Wilmarth.

Q. What did you do thereafter with respect to this sign of smoke?

A. The chief mate and I made a tour through the ship, inspection of all the hatches and all the escapes.

Q. What time was that?

A. That was just after that.

Q. Did you locate any sign of fire or place of origin of [23] the smoke?

A. Not definitely at the time.

Q. Did you take any further action to determine which hatch the smoke was coming from?

A. Well, the smoke was coming from number one by visible means on the smoke detector.

Q. And did you take any precautions at the number one hatch?

A. Well, we shut the dampers on the ventilation system.

The Court: Where?

A. They're on the king post.

The Court: Respecting what hatch, if any?

A. On number one hatch.

The Court: What did you call those, dampers?

A. Fire dampers.

Q. (By Mr. Crutcher): Are those installed on the king post?      A. Yes.

Q. Where are the controls for those?

A. On the king post.



(Testimony of Norman Lewis Tomlin.)

Q. Was there any change in the condition aboard the Oregon Mail with respect to this smoke condition during the remainder of that night? That is, I'm referring now to August 20, 1955.

A. A slight change, increase in the smoke.

Q. Was any watch maintained on the smoke detector unit? A. Yes. [24]

Q. How frequently was the smoke detector unit observed? A. About hourly.

Q. Now, I believe the 21st, the following day, was a Sunday, was it not? A. Yes.

Q. The vessel arrived here in Seattle at Fisher's Dock? A. Yes.

Q. Were you aboard during the 20th?

A. During the morning.

Q. Up to what hour?

A. Till we were tied up at Fisher's.

Q. Can you tell the Court about what time that was, approximately?

A. I'd have to refresh my memory again.

Q. Can you do so?

A. Yes (referring to log book). That was 0800.

Q. That would be 8:00 o'clock a.m.?

A. Yes.

Q. By our laymen's standard of time. Well, up to that time had you taken any further action with respect to this sign of smoke?

A. Yes, we made an inspection about number one to see if we could find the fire, and we still couldn't find any——

Q. Was there any——

(Testimony of Norman Lewis Tomlin.)

Mr. Detels: If the Court please, may I [25] move that the last answer be stricken for the reason that the witness has assumed the existence of a fire without having stated any——

The Court: Did he say he assumed it?

Mr. Detels: Well, may the answer be read?

The Court: Yes, the last answer will be read.

Mr. Crutcher: Will you read the question also, Mr. Reporter?

The Court: That will also be done.

(The reporter read back the question and answer as follows:

“Q. Well, up to that time had you taken any further action with respect to this sign of smoke?

“A. Yes, we made an inspection about number one to see if we could find the fire, and we still couldn’t find any——”)

The Court: The objections are overruled and denied.

Q. (By Mr. Crutcher): Now, did you attempt to determine whether smoke was coming from the king post at the time? A. Yes.

Q. I’m referring now, of course, to the king post at number one hold. Would you tell the Court how many posts there [26] are there?

A. There’s two abreast of each other between number one and two hatches.

Q. Is number one hold the farthest forward in the vessel? A. Yes.

Q. How high do those posts go, just roughly?

A. Seventy feet, I would say.

(Testimony of Norman Lewis Tomlin.)

Q. I believe you indicated, Mr. Tomlin, that you then left the vessel at about eight o'clock on Sunday morning, August 21st. Is that correct?

A. Eight or nine by the time I left.

Q. Now, thereafter did you return to the vessel either that night or the following day?

A. I'll have to refresh my memory with the log book. (Witness refers to log book.) That would be Monday. Yes.

Q. Was that August 22, 1955? A. Yes.

Q. What was your duty during that day?

A. The same as I stated before, just general supervision of cargo and checking times of starting, stopping.

Q. And will you state to the Court whether they commenced discharging cargo from number one hold on that day?

(Witness refers to log book.)

A. Yes, I think they did. Yes, they did.

Q. Did you look at the smoke detector cabinet that day? [27] A. Yes.

Q. Will you describe to the Court what the appearance of the smoke or whatever it was emanating from the detector was on that day?

A. Just smoke coming out of the detector. It was thicker than it had been.

Q. Was there any smoke observed from the king post? A. Yes.

Q. Were the vents opened for the purpose of observing that smoke? A. Yes, they were.

Q. Can you describe to the Court the color of

(Testimony of Norman Lewis Tomlin.)

the smoke and the density as it appeared to you at that time?

A. Oh, I would say a brownish color, fairly thick at that time.

Q. Was this the smoke coming from the king post at that time?

A. And through the smoke detector.

Q. Was smoke coming from any other part of the vessel so far as you could observe at that time?

A. Only from the king post and the smoke detector.

Q. Was the vent on the king post left open continuously at that time, that is, on Monday?

A. No, closed, only to check for the visible smoke.

Q. You mean it was opened only to check for the visible smoke? [28]      A. Yes.

Q. Now, thereafter did you observe damaged barley being removed from number one lower hold?

A. Yes.

Q. About what date was that?

A. Let's see (referring to log book). On the 23rd.

Q. Can you describe to the Court the general appearance of that damaged barley?

The Court: What happened on the 23rd? I did not quite——

A. Just a moment, that was wrong. That was the 24th.

The Court: What happened on the 24th?

A. That's when they started discharging.

The Court: Did you make any report of any

(Testimony of Norman Lewis Tomlin.)

condition in the hold that had anything to do with inspiring or starting that discharging?

A. Yes.

The Court: What was that and when did you make it?

A. That was 1800 on the——

The Court: Give the date and the time of day. I am not familiar with that method of reckoning time.

A. Yes.

The Court: It is cumbersome also. [29]

A. That was at 6:00 p.m. on August 20th.

The Court: So on August the 20th at 6:00 p.m. for the first time you discovered the fire, is that right?

A. Yes, I discovered the smoke.

The Court: I want to know when you discovered the fire, if you did discover it.

A. No.

The Court: Who did, if you know?

A. I think the Seattle Fire Department.

The Court: Did you ever discover the place where the smoke was coming from before the discharge of cargo was commenced?

A. Only by the aid of the smoke detector.

The Court: Did you determine where the smoke was coming from with respect to a local point or spot in the ship?

A. Yes.

The Court: When did you make that determination?

A. At 6:00 p.m.



(Testimony of Norman Lewis Tomlin.)

The Court: What date?

A. On the same date there I just gave.

The Court: The 20th?

A. Yes.

The Court: 6:00 p.m., August 20th?

A. Yes. [30]

The Court: And where was that spot?

A. That was number one lower hold.

The Court: You may inquire.

Q. (By Mr. Crutcher): Now, Mr. Tomlin, advertising now to the time when they commenced removing damaged barley from number one lower hold after they had dug down through the good barley in number one lower 'tween deck, will you describe to the Court the condition or appearance of that barley as you observed it at that time?

A. It was black and caked, stuck together.

Q. Was there any evidence of heat in that char?

A. Yes, there was—not at that time, the heat was gone then.

Q. Would you please state what date that was?

A. That was on the 25th.

The Court: Where was the ship when the discharging was begun?

A. At Pier 88.

The Court: What city?

A. Seattle, Washington.

The Court: You may inquire.

Q. (By Mr. Crutcher): Now, what if anything did you have to do personally with the discharge of that cargo, Mr. Tomlin?

(Testimony of Norman Lewis Tomlin.)

A. Just to, like I say, generally supervise, just get the [31] times that they started, stopped, and the gangs that were in the hatch. Myself and the other officers are all supposed to do that.

Q. Now, were you present at the time that they completed discharging the damaged barley?

\* \* \*

A. Yes.

Q. (By Mr. Crutcher): What day was that?

A. That was the 26th of August.

Q. Now, at that time did you go down into the hold, Mr. Tomlin? A. Yes.

Q. First of all I might ask, was there any smoke issuing from the hold at that time? A. No.

Q. In the meantime had carbon dioxide been applied to this cargo? A. Yes. [32]

Q. Now, did you go down into number one lower hold at that time, that is, on the 26th?

A. Yes.

Q. Was this during daylight hours?

A. Yes, it was.

Q. And were the hatches open at that time?

A. Yes.

Q. And did you have any other means of illuminating the area? A. A flashlight.

Q. And did you make an examination of the number one lower hold at that time? A. Yes.

Q. Would you tell the Court first of all in what general area this burning had taken place, if you can?

(Testimony of Norman Lewis Tomlin.)

A. About the lights in the hatch, the illumination lights.

Q. And was that fore or aft of the square of the hatch?

A. Aft of the square.

Q. Was it on the port or starboard side?

A. On both sides, but mostly on the port side.

Q. Now, I would like to ask you now to describe in a little more detail the condition of these light fixtures, and I ask you first the condition of the light fixture on the port side aft?

A. It was blackened and caked with barley, blackened barley.

Q. What was the appearance of the pyrex glass covering? [33]

A. It was—it had a blackened film over it, too.

Q. What was the condition of the cable adjacent to this lamp?

A. It was hardened and blackened, too, and very brittle.

Q. Now, can you compare the appearance of the lamp on the port side aft of the square of the hatch?

A. Well, that's the one I'm talking about now.

Q. I beg your pardon. I meant the starboard side.

A. On the starboard side it was blackened, but not quite as bad as the port side.

Q. Did you observe the condition of the cable in that area also?

A. Roughly, yes.

Q. And will you tell the Court what the appearance was there?

A. It was in about the same condition, stiff and blackened.

(Testimony of Norman Lewis Tomlin.)

Q. Now, can you describe the appearance of the overhead, that is, the undersides of the lower 'tween deck aft of the hatch coaming?

A. Yes. It was blackened and had blackened kernels of barley stuck to the overhead.

Q. And what was the condition of the paint on the overhead?

A. It was blackened and charred.

Q. Did you see any signs of the paint having burned?

A. Not exactly, no.

Q. Why is that?

A. Because there's only about one or two coats of paint there [34] and it's very thin and it's hard to blister real thin coats. It's sprayed.

Q. Perhaps you misunderstood me. I wasn't asking you about blistering, but about burning.

A. Well, burned, it was burned.

Q. How far aft of the hatch coaming did this condition extend?

A. Mostly around the lights on the port and starboard sides.

Q. Can you estimate about how far aft it went?

A. Well, the blackened condition was about four or five feet aft, but then it was still dark or smoke colored or discolored clear back to the after end of the hatch.

Q. And about how far towards the center of the hatch from the lights did this area extend? I should ask separately first the port side, the port light.

A. Oh, I would say about five feet or so.

The Court: What kind of substance did you say was used to stop that fire?

(Testimony of Norman Lewis Tomlin.)

A. CO<sub>2</sub>.

The Court: What do you call it? You had another name for it.

A. Carbon dioxide.

The Court: You may inquire.

Q. (By Mr. Crutcher): Now, can you describe the approximate dimension of the burned area on the starboard side? [35]

A. About four feet by five feet around the light, centered around the light.

Q. Are you able at this time to describe in detail the various conditions which you observed in and about the lights, the cable and the overhead at that time?

A. Not too well.

Q. Did you form an opinion at that time as to whether or not there had been a fire in that area?

A. Yes.

Q. I refer now to the area adjacent to the light in the after port corner of what I believe is commonly referred to as the trunk, that is the lamp you've been describing, first.

A. Yes.

Q. And will you state what that opinion was?

\* \* \*

Mr. Detels: May I inquire on voir dire, your Honor?

The Court: You may.

Mr. Detels: Mr. Tomlin, have you had any particular educational background in the field of physics?

A. No.



(Testimony of Norman Lewis Tomlin.)

Mr. Detels: Have you had any particular [36] educational background in the field of chemistry?

A. No.

Mr. Detels: If the Court please, I submit that the question calls for an opinion and conclusion of the witness upon a subject which is a matter for expert testimony and that it has not been shown that the witness has any qualifications to testify as an expert on that matter.

The Court: I am not satisfied on the proof shown up to this time. You may inquire further concerning the qualifications if you wish to do so.

Mr. Crutcher: May it please the Court, I'm not offering this opinion as the opinion of an expert, I'm offering this opinion as the opinion of a lay witness, that is a witness without any particular technical qualifications, who was there and saw the conditions and is not able to fully and accurately convey all of the things which entered into his judgment in words. This is a well recognized exception to the general rule.

The Court: Refer to some authoritative statement of such well recognized exception.

Mr. Crutcher: Yes, your Honor. I refer to Volume 7 of Wigmore on Evidence, Third Edition, dealing with the opinion rule.

The Court: Volume what? [37]

Mr. Crutcher: Volume 7 of Wigmore on Evidence, Third Edition.

The Court: What page?

Mr. Crutcher: The several sections commencing with Section 1921. [38]

(Testimony of Norman Lewis Tomlin.)

\* \* \*

Q. (By Mr. Crutcher): First of all I will ask you, Mr. Tomlin, whether you took the cable in your hands on that occasion at any point? A. Yes.

Q. Would you tell the Court what you did?

A. I pulled on it.

The Court: What cable?

A. The electrical cable for the lights.

Q. (By Mr. Crutcher): Now, is this the light in the after port corner of number one lower hold?

A. Yes.

Q. In the same area that you previously have been mentioning? A. Yes.

Q. Would you describe to the Court the condition of the cable that you observed when you pulled on it?

A. It was blackened and stiff and charred.

Q. And what happened when you bent it?

A. The insulation cracked.

Q. Now, I will rephrase the question which preceded my [40] question asking you for an opinion. I am referring now to the area just aft of the hatch coaming of number one lower hold in the vicinity of the lamp which you previously described in that corner, and will ask you whether you formed an opinion as to whether there had been a fire in the immediate area of that lamp? A. Yes.

Q. On the basis of your examination on the day of August 26, 1955? A. Yes. [41]

\* \* \*

(Testimony of Norman Lewis Tomlin.)

Q. (By Mr. Crutcher): Mr. Tomlin, I'll ask you at this point, had you ever previously to this time, August of 1955, observed the effect of fire on an electrical cable similar to that installed in the lower hold of the Oregon Mail for this particular lamp we've been talking about aft of the hatch coaming? A. Yes.

Q. And would you tell the Court what the effect of fire on a cable such as that is?

A. It bakes the insulation, burns the wiring inside or bakes it and takes your strength out of your electrical wiring, plus the armored cable on the outside, it will take the tension out of it, the tensile strength of the cable.

Q. And does this have a distinctive appearance as distinguished from cable in ordinary condition?

A. It all depends on the fire, what type of fire.

Q. Well, what I'm asking is——

A. And the heat.

Q. What I'm asking is, does the condition of a burned armored electrical cable such as was in this hold differ so far as appearance and feel are concerned from the same cable in ordinary condition?

A. Yes.

Q. And are you able from your experience to distinguish the [42] difference between the two?

A. Yes.

Q. Now, confining my question to the condition of the cable, are you able to express an opinion based upon your examination of the cable in the vicinity of this particular light to which we have

(Testimony of Norman Lewis Tomlin.)

been referring, that is aft of the hatch coaming on the port side, are you able to or were you able at the time of your examination on August 26, 1955, to form a conclusion as to whether that cable had been burned?      A. Yes. [43]

\* \* \*

Q. (By Mr. Crutcher): Will you describe the condition of the cable as you observed it on the occasion to which we have just referred, first with reference to the armor or sheathing on the outside of the cable?

A. That was blackened and the inside insulation was baked and hardened, and when I pulled it, it cracked.

Q. What is inside that black sheathing?

A. Some of it has plastic and some has a hard rubber. Then your wires are inside that, but you have a canvas on most of that type wiring inside that before you get to the wires.

Q. Now, what did you observe when you pulled on the wire?

A. That it cracked, the insulation cracked.

Q. Could you see whether or not it was baked?

A. Yes.

\* \* \*

Q. (By Mr. Crutcher): What did you observe?

A. The inside of the cable cracked and cracked any place [44] where it was bent by hand, it would crack around the wire.

(Testimony of Norman Lewis Tomlin.)

Q. Now, had you observed a similar condition previously in other similar cable in your experience? A. Yes.

Q. And what had been done to that previous cable? A. It had to be replaced.

Q. Well, I mean what gave rise to the condition in the other cable that you previously saw?

A. A fire.

Q. Was the cable itself immersed in the fire?

A. Yes.

Q. Did the cable or the insulation have a distinctive feel in your hand? A. Yes.

Q. Was that different than the feel of ordinary cable?

A. It's entirely different from good wire, wire that hasn't been in a fire.

Q. Can you explain to the Court what the sensation is of taking hold of a piece of cable that has been burned?

A. It's softer and it will—any movement will—it will crackle and your insulation cracks.

Q. Now, referring to this particular cable in the vicinity of the after port light of the number one lower hold which you have previously mentioned in your testimony, was there any difference between that cable and this cable [45] you have just described? A. Not much.

Q. On the basis of that observation and that feeling of the cable did you arrive at a conclusion or opinion as to the condition which had resulted in the damage to the cable? A. Yes.



(Testimony of Norman Lewis Tomlin.)

Q. Will you state what that opinion or conclusion was? [46]

\* \* \*

A. That there had been a fire around the lights in the hatch.

\* \* \*

### Cross-Examination

By Mr. Detels:

Q. Mr. Tomlin, in your direct testimony I'm not sure I understood whether with reference to the date of August 18th you testified that you were instructed by someone to pull the fuses or you instructed some other person to pull the fuses.

A. No, I instructed—I was instructed myself and the third [47] or fourth mate to instruct the electrician, chief electrician, to pull the fuses.

Mr. Detels: I move to strike that answer as not responsive.

\* \* \*

The Court: The objection is overruled and the motion is denied.

Q. (By Mr. Detels): Did you instruct yourself anyone to pull the fuses for the cargo lights in the number one hold? A. No.

Q. Now, with reference to the practice on American Mail Line vessels with respect to fuses in grain hatches, is it the practice to pull all the fuses in any hatch in which grain [48] has been loaded, including fuses in compartments which are not loaded with grain?

(Testimony of Norman Lewis Tomlin.)

A. No. It's only in the compartments with wheat or grain cargo.

Q. So that if on a particular occasion grain is loaded in the number one lower hold and number one lower 'tween deck only, it would not be the practice to remove the fuses for the cargo lights in the number one upper 'tween deck?

A. Yes, we would usually. That's the usual practice, but on the fuse box there's lights for the king post lights and outside lights, too, so you can't remove them all.

Q. Well, I am afraid I misunderstood you. If cargo of grain is loaded in the lower hold but not in the 'tween decks, is it the practice on American Mail Line vessels to remove the fuses for the cargo lights in the 'tween deck compartments?

A. No, we wouldn't except if it was—as long as it's in the lower hold, but if you come into the 'tween deck with the cargo we would remove the fuses.

Q. Well, now, if the cargo is loaded in the lower hold and in addition in the lower 'tween deck, is it the general practice on American Mail Line vessels to remove the fuses for the cargo lights in the upper 'tween deck?

A. We would probably leave them in. [49]

Q. Well, is that the general practice to leave them in? A. On this ship it is.

Q. Well, on August 18th were you instructed to remove all the fuses for the cargo lights in the num-

(Testimony of Norman Lewis Tomlin.)

ber one hatch or only the fuses for the cargo lights in the compartments containing barley?

A. Just the compartments with the barley.

Q. Were you present when the third officer issued instructions to the electrician? A. No.

Q. Did you at any time after August 18th and until you made this discovery of smoke at Vancouver, B. C., on August 20th enter the number one resistor house? A. Yes.

Q. Now, I'm referring now to prior to your observation of smoke at Vancouver on August 20th.

A. Yes.

Q. Did you observe the switches in the distribution panel controlling the number one hold?

A. Yes.

Q. Did you observe the position of the switches?

A. No.

Q. Did you observe the fuses?

A. No. There's a double door, you can't see the fuses.

Q. You did not open the door? [50]

A. Just the single door is the only one you open for turning on lights.

Q. Did you enter that resistor house for the purpose of turning on lights? A. Yes.

Q. Where was that? A. What port?

Q. Yes.

A. Oh, every port, practically. I turn on the lights all the time.

Q. Well, I'm referring now to the specific period beginning with the time you were instructed to remove the fuses for the lights in the number one

(Testimony of Norman Lewis Tomlin.)

hold and ending with the time at which you observed smoke in the smoke detector cabinet on the evening of August 20th. A. Yes.

Q. And I'm asking you if you turned on the switches in the number one resistor house at any time during that period.

A. For the deck lights.

Q. And when would that have been, and if it will assist you to refer to the rough deck log, please do so.

A. Well, it would be—(referring to log book)—that would be on August 18th.

Q. And would you be able to state the time of day?

A. Oh, I would say seven—oh, sixteen, or 4:45 p.m. [51]

Q. You would turn on the deck lights prior to 5:00 o'clock in the afternoon of a day in August?

A. Yes.

Q. Did you observe the position of the switch controlling the hold lights in the number one lower hold at the time you turned on the deck lights on the evening of August 18th?

A. I wouldn't pay any attention to them when I turned the deck lights on. There's just a standard switch arrangement for your deck lights. [52]

\* \* \*

The Court: The objection is sustained.

Q. (By Mr. Detels): On the evening of August 20th at Vancouver, B. C., after you reported that

(Testimony of Norman Lewis Tomlin.)

you had observed smoke in the smoke detector cabinet to the chief mate and the master, did they make an observation of the smoke detector cabinet in your presence?           A. Yes.

Q. Was smoke visible at that time?

A. Yes.

Q. Directing your attention to a log entry in the rough log, Respondent's Exhibit A-1, for August 20, 1955, on the left-hand page bearing the time 1800, will you read that, please?

A. Yes. (Reading):

"1800. Second mate informed master and chief mate of a suspicious odor coming from the smoke detector. Checked same and no visible signs of smoke showing. Chief mate and second mate checked all cargo spaces except number one lower hold which is plugged with grain. Nothing unusual found. Robert——"

Well, "R. P." are the initials. Rodney Palmer.

Q. Now, is that entry in error insofar as it states that no smoke was visible? [53]

A. That's not my entry.

Q. Well, I appreciate that, but in fact there was visible smoke at the smoke detector cabinet at the time to which this entry refers, was there not?

A. Yes, in my opinion.

Q. Were you present at the time this entry was made in the rough deck log?

A. I don't remember.

Q. Do you know when it was made?

A. At that same time, after we inspected the cargo holds.



(Testimony of Norman Lewis Tomlin.)

Q. Well, directing your attention to the immediately preceding entry bearing the time 2200——

A. Yes.

Q. Would it not be the normal procedure for the entries to be made in chronological order and would it not indicate that the 1800 entry was made after the 2200 entry?

A. No. It could be made any time. It would take us almost that long to go through all the spaces.

Q. Were you aboard at Seattle the following morning, August 21st, when Captain Greenwood, the Port Captain of American Mail Line, came aboard the vessel? A. Yes.

Q. You were aboard at that time?

A. Yes, I'm pretty sure I was.

Q. Did you have any conversation with [54] him? A. I don't remember.

Q. Do you recall whether or not he asked you any questions concerning your observations of the preceding evening?

A. No, I don't remember that.

Q. Did you enter the number one resistor house on the evening of August 20th?

(Witness refers to log book.)

A. Let's see. I would say no, I don't think so.

Q. Did you make any investigation at any time to determine whether the lights had been left on in the cargo of barley loaded into the number one lower hold? A. Not that I remember.

The Court: In what condition did you find the

(Testimony of Norman Lewis Tomlin.)

fuses, if you examined the fuses, after you discovered the smoke?

A. I didn't examine the fuses that I remember of.

The Court: You do not know whether they were then burned out or not?

A. No.

The Court: What time of the day was it when you first saw what you thought was smoke coming from the hold?

A. At 6:00 p.m.

The Court: On the 20th? [55]

A. On the 20th of August, yes.

The Court: You may proceed.

Q. (By Mr. Detels): Referring now to August 22nd when the vessel was at Seattle, during what hours were you on duty aboard the ship?

A. Till we docked at Fisher's Mill.

The Court: How many days or how many hours was that?

Mr. Detels: If the Court please, I believe the witness is confused as to the date, and——

The Court: That is one reason the Court asked the question.

A. Oh, on the 22nd. I misunderstood that.

Mr. Detels: Yes.

A. That was—let's see (referring to log book). Let's see, I wasn't—I think I had that day off.

Q. (By Mr. Detels): You were not aboard the vessel on August 22nd?

A. I don't think so, to the best of my memory.

(Testimony of Norman Lewis Tomlin.)

Q. Well, I understood your previous testimony to be that the discharge of cargo from the number one hold had been commenced on that day.

A. Yes.

Q. You have no personal knowledge of that then, do you?

A. Not personal, but just by the log book. [56]

\* \* \*

Mr. Detels: If the Court please, this is the only witness that I believe we will have this problem with. The witness' vessel sails this evening. We will wish to put in a case in rebuttal, and rather than take steps to delay the witness or prevent him from sailing at all I would like to examine him as my witness as a part of my rebuttal case. [60]

The Court: Is there any objection to that?

Mr. Crutcher: None, your Honor.

The Court: You may do so if you can get through right away. Do you wish these questions and answers that were objected to considered in that connection?

Mr. Detels: Yes, I do, your Honor.

The Court: Do you know which one initiates that phase of your examination? If so, state which one, so the reporter can identify it.

\* \* \*

(The reporter read back as follows:

“Q. (By Mr. Detels): Mr. Tomlin, the smoke detector cabinet to which you previously referred is equipped with an audible alarm system, is it not?

(Testimony of Norman Lewis Tomlin.)

“A. Yes.

“Q. And that is a buzzer? A. A bell.

“Q. A bell? [61] A. Yes.

“Q. Now, did that bell sound at any time aboard the vessel during the period August 18th to August 26th to your knowledge?

“A. Not to my knowledge.

“Q. Will you explain how that bell is activated?

“A. The smoke, if there is a fire, comes up into the cabinet, goes past a photoelectric cell, and when it gets dense enough it sets off the alarm.

“Q. Is that system tested from time to time?

“A. Yes. At that time, yearly.

“Q. And what is the manner of testing it to determine that the buzzer is in operating condition?

“A. Well, there's two different methods that I've experienced. One is by a cigarette with a long stick to reach up into the overhead and a little bellows makes it smoke bad, and then an envelope full of chemical, and you light the end of the chemical and it [62] throws a heavy smoke out, and it's checked in the wheelhouse and by one of the officers of the ship and usually Alexander Gow here in Seattle or Portland.

“Q. In your experience has the bell on the Oregon Mail smoke detector cabinet been activated by a cigarette attached to this bellows apparatus that you referred to? A. Yes.” [63]

\* \* \*

Q. (By Mr. Detels): Do you recognize the electrical panel which appears in Libellant's Exhibit 1?

(Testimony of Norman Lewis Tomlin.)

A. Yes.

Q. Can you state what panel that is?

A. That would be in any of the hatches, but this is probably the one in number one resistor house. The three of them are identical.

Mr. Detels: I will offer Libelant's Exhibit 1.

Mr. Crutcher: No objection.

The Court: Admitted.

(Libelant's Exhibit No. 1 for identification was admitted in evidence.)

Q. (By Mr. Detels): Directing your attention to the paint markings appearing around and adjacent to the switches in that photograph, can you state whether or not those paint markings were in existence during the period August 17th to 20th, 1955?

A. I don't recall. [64]

\* \* \*

### RICHARD C. WILMARTH

called as a witness in behalf of respondent, being first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Crutcher:

Q. Will you please state your full name and spell your last name, Captain?

A. Richard C. Wilmarth, W-i-l-m-a-r-t-h.

The Court: W. C.?

A. R. C.



(Testimony of Richard C. Wilmarth.)

Q. (By Mr. Crutcher): Where do you live, Captain? A. Hoquiam, Washington.

Q. Do you have some difficulty with your hearing, Captain? A. Yes, sir.

Q. Can you hear my questions fully from here?

A. Yes, I do now.

The Court: Captain, you ask Counsel and anyone else to repeat if you do not clearly understand, will you do that?

A. Yes, sir.

The Court: Feel free to do that.

A. All right, sir.

The Court: Rather than to take a chance on making an irresponsible answer.

Q. (By Mr. Crutcher): What is your occupation? [75] A. Ship's officer.

Q. And how long have you been in the merchant marine? A. Thirty years.

Q. When did you start and in what capacity?

A. I started as a seaman in 1926.

Q. And have you been in the American merchant marine continuously since that time?

A. Yes, except for short periods.

Q. When did you get your first deck officer's license? A. April, 1934.

Q. And have you held a license from the United States Coast Guard since that time as a deck officer? A. Yes.

Q. What licenses do you presently hold?

A. Master.

Q. Is that an unlimited ocean master?

A. Sir?

(Testimony of Richard C. Wilmarth.)

Q. I beg your pardon. I'll rephrase that question. Is that a master's license, unlimited ocean?

A. Yes.

Q. And is that issued by the United States Coast Guard? A. Yes.

Q. In what trades have you served generally?

A. Mostly in the Oriental trade, to the Far East, but quite a bit of coastwise work, too. [76]

Q. In the course of that trade have you been on vessels carrying grain? A. Yes.

Q. On many occasions?

A. Oh, at least ten.

Q. Captain, when did you go to work for American Mail Line? A. In August of 1942.

Q. About how many of their vessels have you served on? A. Ten.

Q. And how long did you continue your employment with American Mail Line?

A. Fourteen years.

Q. Were you on duty on the SS Oregon Mail in August of 1955, that is for what is called Voyage 33 of the SS Oregon Mail?

A. Yes. I was master at that time.

Q. Now, do you recall where and when you went aboard the ship to commence that service on that occasion? A. April the 9th in Seattle.

Q. Would that be August 9th, Captain?

A. Or August, excuse me. I beg your pardon.

Q. And thereafter were you continuously aboard or in command as master during that voyage?

A. Yes.

Q. Did you have any duties to perform person-

(Testimony of Richard C. Wilmarth.)

ally with [77] respect to the loading of a cargo of barley at Vancouver, Washington?

A. Not exactly personally. The chief officer was in charge of loading. Of course I'm responsible, but he was directly in charge of it.

Q. Did you have any personal knowledge of conditions aboard in the cargo holds at that time?

A. Only that the holds were reported ready for cargo and cleaned and ready for cargo.

Q. Now, did you have anything to do with the loading of cargo at Longview, Washington?

A. Well, the same thing, I was in charge but the mate was actually doing the work.

Q. Is that a customary allocation of duty?

A. That's usual.

Q. Do you recall a report received by you on the evening of August 20, 1955, concerning smoke or an odor from the smoke detector cabinet in the pilothouse of the Oregon Mail?

A. Yes.

Q. Would you tell the Court what was reported to you at that time?

A. Well, one of the watch officers, I don't remember which, reported this odor from the smoke detector exhaust, and we all smelled it but we couldn't identify it as smoke [78] or anything. We just didn't know what it was, but we—

Q. Can you tell the Court as best you can just what it was that you did detect at that time?

A. Well, the smoke detector system shows the—it's supposed to call an alarm. However, there's an exhaust pipe that can be opened and closed. We

(Testimony of Richard C. Wilmarth.)

opened the opening on that and smelled the exhaust coming out much more than we would from the inside of the cabinet, and the odor was there.

The Court: That watch officer notified you of the odor that was shown on the smoke detector, is that what you call it?

A. Yes, sir.

The Court: Smoke detector?

A. Yes, sir.

The Court: You may inquire.

Q. (By Mr. Crutcher): Captain, what action did you take at that time, if any, concerning this condition?

A. I instructed a close watch be kept on the smoke detector apparatus for further developments.

Q. And did anything further occur that night which was called to your attention?

A. Not that I remember.

Q. Now, I believe the vessel then proceeded on that night to Seattle, did it not? [79]

A. What was that again, please?

Q. I say the vessel proceeded on to Seattle, did it not, on that night? A. Yes, sir.

Q. And the next morning you were at Fisher's in Seattle?

A. The next morning we tied up at Fisher's, yes.

Q. And were you on board at that time?

A. Yes.

Q. What action, if any, was taken at that time with respect to this condition which had been observed in the smoke detector?

(Testimony of Richard C. Wilmarth.)

A. Well, the odor was more pronounced, and one of the mates reported that he thought he saw smoke coming out of the port louver, the exhaust in the head of the king post on the port side, number one gear.

Q. Now, Captain, where is that king post located with reference to the foredeck on the ship?

A. On the port side in the after end of number one hold, that is at the resistor house at number one.

Q. Now, were you able to see smoke yourself at that time?      A. I did not actually see it.

Q. Did you call for any assistance from American Mail Line personnel in Seattle at that time?

A. Yes, then I called Captain Greenwood.

Q. And were there some surveyors also on board that day? [80]

A. There were cargo surveyors aboard, yes.

The Court: I would like you to tell the Court again what you first did about this smoke report. What was the first thing you did about it? Just tell everything that you did about it.

A. That was on Monday morning coming down?

The Court: You spoke of the watch officer having told you, the first you ever heard of it, that the smoke detector indicated the presence of smoke somewhere in the ship.

A. Yes.

The Court: And then after that you said that you could smell something but you couldn't tell what the smell was, is that right?



(Testimony of Richard C. Wilmarth.)

A. Yes.

The Court: Then after that what did you do about it, if anything?

A. We——

The Court: What was the order of the events of your acting with respect to this smoke?

A. We sat a continuous watch on the smoke detector system, we kept it under surveillance at very frequent intervals.

The Court: You may proceed.

The Witness: And it was to be reported to [81] me if there was any significant change.

The Court: Proceed.

The Witness: Any visible signs of smoke or anything like that. At that time there hadn't been until we got to Fisher's Dock in Seattle that morning.

The Court: What morning?

A. Sunday morning, the 21st.

The Court: What month was that?

A. August.

The Court: And where was this Sunday morning arrival, at what dock, at what place?

A. Fisher's Flour Mill.

The Court: What was the date when that watchman made the report as to what the smoke screen or smoke detector showed?

A. Well, there was a more pronounced odor that morning.

The Court: I am talking about the first time he talked to you about it, the first time he spoke of it.

A. Oh.

(Testimony of Richard C. Wilmarth.)

The Court: What date was that?

A. That was the 20th.

The Court: Where was the ship then?

A. She was en route from Vancouver, B.C., to Seattle. [82]

The Court: What else did you do after the Fisher's Dock arrival?

A. Well, the officers and I tried to trace it down the best we could among ourselves and finally decided at nine o'clock to call Captain Greenwood.

The Court: Nine o'clock on that day, the 21st?

A. Yes, sir.

The Court: Was that a.m. or p.m.?

A. A.M.

The Court: What else did you do?

A. Well, I called Captain Greenwood and he in turn called several surveyors.

The Court: Who is Captain Greenwood?

A. He's Port Captain for the American Mail Line, and he called Mr. McGinitie, the surveyor, and the Alexander Gow people, the chemists, and all that.

The Court: What else did you do?

A. Well, we took hold temperatures.

The Court: Took what?

A. Temperatures of the hold by means of a thermometer down the bilge pipes, sounding pipes.

The Court: What else did you do?

A. And we made every effort to locate the exact position of what we thought would be a fire.

The Court: Next what did you do? [83]

(Testimony of Richard C. Wilmarth.)

A. Nothing that morning. We decided to wait awhile, I think, until developments, and we were to shift over to Pier 88 that afternoon anyhow.

The Court: In the afternoon what did you do?

A. We shifted to Pier 88, shifted the ship to Pier 88, which is the Americal Mail Line home dock.

The Court: What else did you do?

A. Kept a continuous watch on the smoke.

The Court: What else did you do?

A. And one officer and myself stayed on board all the time.

The Court: What else did you do?

A. Well, that's all for right now.

The Court: You may proceed.

Mr. Crutcher: Thank you, your Honor. I have requested the clerk to mark a photograph for identification as Respondent's Exhibit——

The Clerk: Respondent's Exhibit A-2.

(A photograph was marked Respondent's Exhibit A-2 for identification.)

Q. (By Mr. Crutcher): Captain, I ask you to examine this photograph and to state to the Court whether the forward king posts which appear in this photograph, that is the ones in the foreground of the photograph, are the king posts serving number one hold? [84]

A. That is right, the after end of number one.

Q. I'm sorry, I didn't catch that last.

A. The after end of number one.

Q. Now would you state which one in this photograph is the so-called port king post?

(Testimony of Richard C. Wilmarth.)

A. It's this one here on the——

Q. Would that be the one that's on the right of the photograph?

A. On the right of the picture as I'm looking at it, yes, sir.

Q. Does this fairly represent the structure of the king posts?      A. Yes.

Q. As of August, 1955?      A. Yes. [85]

\* \* \*

Q. (By Mr. Crutcher): What I mean is, did the vessel's officers, including yourself, take any action on Monday concerning this condition which was developing in the [86] number one lower hold?

A. Well, we stopped all loading in number one and decided to discharge the hold.

\* \* \*

Q. (By Mr. Crutcher): Did the vessel start discharging cargo from number one hold on that day?

A. Yes.

Q. And was that discharge continuous?

A. Yes.

Q. How long did it take to discharge the cargo above the barley in number one lower 'tween deck?

A. I don't recall, but probably the next day. I'll have to consult the log book. [87]

\* \* \*

Mr. Crutcher: I ask that the bailiff show the witness the book which has previously been identified as Respondent's Exhibit A-1.

\* \* \*

(Testimony of Richard C. Wilmarth.)

Q. (By Mr. Crutcher): Captain, I'm going to ask you a preliminary question about the book itself. Do you recognize your signature on those pages?

A. Yes.

Q. Is that your signature?

A. That is my signature. [88]

Q. And do you recognize this book?

A. Yes.

Q. Would you tell the Court what it is?

A. This is the bridge log kept by the ship's officers of the Oregon Mail on Voyage 33.

Q. Is that a contemporaneous record, I mean a record kept from time to time during the day as events occur?

A. Yes.

Mr. Crutcher: Your Honor, I now offer Respondent's Exhibit A-1.

Mr. Detels: No objection.

The Court: It is admitted.

(Respondent's Exhibit No. A-1 for identification was admitted in evidence.)

Q. (By Mr. Crutcher): Captain, I'm inquiring now as to events on Monday, the day following the day that you arrived at Seattle and the first day you were at Pier 88.

A. Yes.

Q. This is August 22nd, I believe.

A. Yes. [89]

\* \* \*

Q. (By Mr. Crutcher): Who made the decision to effect that discharge?



(Testimony of Richard C. Wilmarth.)

A. I made it myself in conference with other officials of the company.

Q. Who were those other officials?

A. Captain Greenwood and Captain Swanson.

Q. Was any other action taken on that day with reference to the safety of the vessel?

A. Yes. We stopped discharging all—or stopped loading all loading operations about three o'clock or four o'clock that afternoon.

Q. Was there an exception in the case of reefer cargo?

A. Except some very perishable reefer cargo that had to be put aboard right away.

Q. Now, how long did it take to clear away the number one lower 'tween deck after you finished removing the cargo over the barley? Or, putting it another way, will you describe to the Court what was then done?

A. Well, we cleaned the 'tween deck, swept it up, the upper 'tween deck, and we called for a clam-shell and the proper transportation to discharge the barley until we could get down to the area. [91]

\* \* \*

Q. (By Mr. Crutcher): Will you tell the Court what was done after you completed discharging the lumber on top of the [92] barley in number one lower 'tween deck?

A. Well, then we checked with the stevedore foreman and got all of the stevedores out of the hold, and we attempted with a length of black iron pipe to put some CO<sub>2</sub> into the area by poking it down through the grain.

(Testimony of Richard C. Wilmarth.)

Q. Was any covering laid over the barley before this was done?

A. Yes. We laid the pontoons down on top of the barley—no, wait a minute now. Not at that time, no.

Q. Thereafter during the early morning of the 24th was anything done to——

The Court: What all did you do on the 23rd, Captain, if you did anything on the 23rd besides finish the work of unloading those timbers? What else did you do on the 23rd?

A. Well, the night of the 23rd, why we rigged this——

The Court: What did you do during the day, the afternoon of the 23rd?

A. In the afternoon of the 23rd, well, we just continued discharging the timbers.

The Court: Very well. So you did not finish them on the morning of the 22nd, you finished them on the night of the 22nd, is that right, or on the morning of the 23rd? [93]

A. We finished the timbers the morning of the 23rd.

The Court: What else did you do on the 23rd, if you did anything, about this situation?

A. Well, the fire chief was aboard that evening, and then at 9:30 that night, why we rigged this portable CO<sub>2</sub> bottle.

The Court: You may proceed.

Q. (By Mr. Crutcher): Captain, I would like to know now, and I want to go back just one step

(Testimony of Richard C. Wilmarth.)

in our testimony, on Monday the 23rd, the day following your arrival at Seattle, was there any difference or change in the issuance of smoke from the vessel?

A. Yes, there was evidence of smoke that morning.

The Court: That is what day?

A. That was on the 23rd.

Q. (By Mr. Crutcher): Now, Captain, excuse me, I'm referring now to Monday the 22nd.

A. Monday the 22nd?

Q. Yes, sir. Did you observe smoke on that day yourself? A. Yes.

Q. And where did you observe that smoke?

A. We took it from the smoke detector then.

Q. Can you describe to the Court the color and density of the smoke? [94]

A. Well, it was very, very light and it was just a wisp of smoke. I don't exactly know the color of it. We also saw wisps of smoke if the sun was just right coming from the king post.

Q. Now, thereafter did the smoke change in volume or density? A. I don't recall that it did.

Q. Now, did you have the king post closed at that time? A. We closed the dampers off, yes.

Q. Is this the same king post which appears in the photograph which has previously been identified? A. Yes.

Q. Now, Captain, I want to go back now to the events on the 23rd. Did you complete your discharge on the 23rd?

(Testimony of Richard C. Wilmarth.)

The Court: What discharge?

Mr. Crutcher: The discharge of cargo—excuse me, your Honor.

Q. (By Mr. Crutcher): The discharge of cargo in the lower number one 'tween deck other than the barley?

The Court: Other than what?

Mr. Crutcher: Other than barley.

The Court: Do you mean the timbers he has spoken of?

Mr. Crutcher: Yes.

The Court: He has not spoken of discharging any cargo other than timber. [95]

A. Well, there was some other cargo in there.

The Court: What was it, of what nature?

A. Oh, some stuff called Gilsonite.

The Court: What else, if anything?

A. And—well, that's all we discharged.

The Court: You may proceed.

Q. (By Mr. Crutcher): Did you proceed as rapidly as you could, or was—I beg your pardon, that's not properly stated. Could the vessel have been discharged more quickly than it was?

A. No.

Q. Now can you tell the Court again, just to clarify the record on this, when it was that the lumber was finally completely discharged from number one lower 'tween deck.

A. When was it discharged?

Q. Yes, when you completed it. Just to get our time straight.

A. On the 23rd at midnight.

(Testimony of Richard C. Wilmarth.)

Q. Are you now referring to the log book?

A. I am now, yes, sir.

Q. Now, after the lumber had been completely removed will you tell the Court what was done aboard the ship next?

A. Well, we cleaned the lower 'tween deck, the 'tween deck hold of all the trash and dunnage, and then we got this——

The Court: When did you do that?

A. Sir? [96]

The Court: When——

A. Right after the timber—that was early in the morning of the 24th, sir.

Q. (By Mr. Crutcher): At what time?

A. Well, it was at one o'clock when the gangs resumed work after their meal period, their mid-night meal period.

Q. Now would you tell the Court what was done next?

A. At that time, why as soon as they were finished cleaning there we covered the hatch and released several bottles of CO<sub>2</sub> from the system.

Q. During that day did you apply CO<sub>2</sub> to this area?      A. Yes.

Q. What is CO<sub>2</sub>, Captain?

A. Carbon dioxide under heavy pressure. Well, it's carbon dioxide.

Q. And how is that used aboard ship?

A. It's in banks of large bottles and compressed, and these bottles are all connected to a main line, and you open the bottles, as many bottles as you



(Testimony of Richard C. Wilmarth.)

wish to use. Then you go to the manifold in the compartment on the vessel that you wish to smother or to apply your CO<sub>2</sub> and you open that proper valve in that manifold, and you can discharge as many bottles as you wish at any given time by opening the bottles. There's a special wrench for that. [97]

Q. Now, is that a permanent pipe installation?

A. Yes.

Q. Does the lower hold, lower number one hold of the Oregon Mail have a smothering line in it?

A. Yes.

Q. And was this CO<sub>2</sub> directed to that hold?

A. Yes.

Q. Would you tell the Court how many bottles of CO<sub>2</sub> were applied to that area during the 24th of August?

A. Well, let's see. On the 24th——

Q. I might ask a preliminary question, Captain. Have you made a computation of the total number of bottles applied? A. Yes, I did.

Q. Do you have a memorandum which would refresh your memory as to the number?

A. Yes. Forty-six bottles of CO<sub>2</sub> were discharged altogether, forty-one bottles on the 24th and four bottles on the 25th and one additional bottle on the 24th from the deck.

Q. Now——

The Court: How many bottles in all, please?

A. Sir?

The Court: Just repeat how many bottles in all you used.

(Testimony of Richard C. Wilmarth.)

A. Forty-six, sir.

The Court: You may inquire. [98]

Q. (By Mr. Crutcher): Captain, were those bottles applied all at the same time or over an interval of time?

A. No, the bottles were released, some—nine bottles at one time, eight bottles another and four bottles at another time and two bottles——

The Court: Beginning when and ending when did the releasing of the CO<sub>2</sub> take place?

A. In the morning at 3:05 of the 24th.

Q. (By Mr. Crutcher): When was the last bottle——

The Court: Wait just a minute.

Mr. Crutcher: I beg your pardon, your Honor.

The Court: When was the first CO<sub>2</sub> put down the drain pipes or wherever you put it down that you previously spoke of? What was the first hour of the first day you began using that CO<sub>2</sub>?

A. The first day we used the CO<sub>2</sub> was——

The Court: Yes, sir, but what day was that?

A. A portable bottle, was on the 23rd.

The Court: Beginning the 23rd about what time?

A. At 9:30 at night.

The Court: And then when did you quit using it altogether?

A. On the 25th.

The Court: What hour?

A. 1330. That would be 1:30 in the [99] afternoon.

The Court: You may inquire.

(Testimony of Richard C. Wilmarth.)

Q. (By Mr. Crutcher): Captain, what was the effect of applying this CO<sub>2</sub> to the number one lower hold?

A. Well, it smothered what fire there was down there. It smothered, put out the fire.

Q. How did you know that?

A. Well, the surveyors came down, we all went down and there was no more smoke down there and there was——

Q. Well, maybe you misunderstood my question, Captain. A. Oh.

Q. Before you went down into the hold did you have any way of observing what effect it had had on that area? That is, let me ask you this: Was there any more smoke coming from the smoke detector?

A. Oh. There was no more smoke coming from the detector and no more odor of smoke.

Q. Are we referring now to the 25th?

A. Yes.

Q. Now, Captain, when did they start taking barley out as distinguished from this other cargo that had been on top of it?

A. At eight o'clock on the 25th, eight o'clock in the morning.

Q. And how long did that operation continue? That is, I'm asking now, Captain, when was it that they finally cleared out the barley down to the area in the lower hold as far [100] as they went?

A. Well, they were still working there on the 26th.

Q. Well, then when did they finish?

(Testimony of Richard C. Wilmarth.)

A. That was at 10:30 in the morning they stopped discharging grain.

\* \* \*

Q. (By Mr. Crutcher): Now, during any of this time from Monday until Friday had they been loading other cargo in the vessel?

A. Only that reefer cargo we referred to.

Q. And why was it that you weren't loading other cargo?

A. Well, there was just the possibility that a dangerous situation might exist to other people on the ship.

Q. Danger from what source?

A. And the rest of the cargo on the ship.

Q. Danger from what source?

A. Well, after all, there was a fire in the ship, and wherever there's a fire, there's danger.

Q. Now, Captain, did you personally go down into the number one lower hold after they discharged the barley? [101]

A. Yes.

Q. Would you describe to the Court what you observed down there? And I'm referring now to the physical condition of the after part of number one lower hold.

A. I observed the paint work was badly scorched, discolored, and that the hold light there in the after end was blackened.

The Court: What was blackened?

A. The cargo light in the hold, the installed cargo light.

(Testimony of Richard C. Wilmarth.)

The Court: Cargo light? A. Yes, sir.

The Court: You many inquire.

A. And definite evidence of smoke and scorch.

Q. (By Mr. Crutcher): Was this on the overhead?

A. This was on the overhead and on the after end of the—the after side of the hatch beam or coaming.

Q. I wish to ask you one question that relates back just a moment in time, Captain. Previously on the day or on the preceding day had you helped to bring out a bucket or more of this charred barley that was being taken from that area?

A. Yes, I did.

Q. Would you tell the Court what the appearance of the barley was in that bucket? [102]

A. It was black, and it was actually crackling and the bucket itself was hot.

Q. Did you touch the bucket?

A. Yes, sir.

Q. Would you tell the Court what the sensation was?

A. The bucket was too hot to handle by hand, to hold in your hands.

Q. Was there any smoke issuing from that?

A. No, I didn't see it.

Q. Now, Captain, had you previously observed a fire on board a ship? A. On any ship?

Q. Yes.

A. Small fires on various vessels that I've been in, paint locker fires and galley.



(Testimony of Richard C. Wilmarth.)

Q. Are you familiar with the effect which fire has on a painted steel plating surface? A. Yes.

Q. On a ship? [103] A. Yes.

\* \* \*

Q. (By Mr. Crutcher): Captain Wilmarth, these fires that you mentioned a moment ago on other vessels, were you personally aboard the vessel at the time these fires occurred? [105]

A. Yes.

Q. And did you personally know that there was a fire in the area which was affected? A. Yes.

Q. Did you personally observe the surface, the metal plating surface of the vessel area where such fires occurred? A. Yes.

Q. Was that a part of the performance of your duties as an officer? A. Yes.

\* \* \*

Q. (By Mr. Crutcher): Captain, I'm now referring to the Oregon Mail again and the number one lower hold. Would [106] you tell the Court about what time you went down into the hold, if you recall?

A. We went down there on the—(referring to the log book)—on the 25th. That was in the lower hold.

\* \* \*

(A blueprint plan of SS Ocean Mail and SS Washington Mail was marked Respondent's Exhibit No. A-3 for identification.)

(Testimony of Richard C. Wilmarth.)

(A half size blueprint plan was marked Respondent's Exhibit No. A-4 for identification.)

\* \* \*

Q. (By Mr. Crutcher): Captain, showing you a photostatic copy of a blueprint which has been marked for identification as Respondent's Exhibit A-3, I will ask you if you recognize what that is?

A. Yes. This is a blueprint of the hold plan and deck plan of the Oregon Mail.

Q. Are you personally familiar with the vessel plans for that vessel? A. Yes.

\* \* \*

Q. (By Mr. Crutcher): Will you describe generally to the Court what this blueprint is, Captain?

A. Well, this is a builder's blueprint of the ship. Over [108] here on the right is the immersion plan and the capacities of all the various compartments, and over here is the——

The Court: The capacity for holding cargo, or what do you mean?

A. The cubic capacity, sir.

The Court: Do you mean the cubic capacity for receiving cargo?

A. The internal cubic capacity of the compartments, sir, whatever it is designed for.

The Court: You may proceed.

Q. (By Mr. Crutcher): Does that include all of the space? A. All the spaces on the ship, yes.

Referring to the plan showing number one hold and number one king post—— A. Yes.

Q. ——and number two deep tanks, I ask you,

(Testimony of Richard C. Wilmarth.)

Captain, whether this plan fairly shows the construction of that area of the vessel as of August, 1955?      A. Yes, it does.

Mr. Crutcher: Your Honor, I will offer Respondent's Exhibit A-3.

Mr. Detels: No objection.

The Court: Admitted.

(Respondent's Exhibit No. A-3 for identification was admitted in evidence.) [109]

Q. (By Mr. Crutcher): Next, Captain, I will ask you to look at the half—or excuse me.

Mr. Crutcher: Your Honor, I think it will be stipulated that Respondent's Exhibit A-4 is a half of the ship's plan cut for convenience to be more easily examined by the witness and by the Court and that it is an exact copy from Respondent's Exhibit A-3. Is that agreeable?

Mr. Detels: No objection. It is so stipulated.

Mr. Crutcher: With that understanding, your Honor, I offer Respondent's Exhibit A-4 and request that the witness now refer to that rather than to Respondent's Exhibit A-3, simply as a matter of physical convenience.

The Court: It is now admitted, A-4.

(Respondent's Exhibit No. A-4 for identification was admitted in evidence.) [110]

\* \* \*

Q. (By Mr. Crutcher): Captain, will you state what the top figure is in Respondent's Exhibit A-4?

(Testimony of Richard C. Wilmarth.)

A. The top figure is the longitudinal plan, the profile plan of the ship.

Q. Are you referring now to the Oregon Mail?

A. The SS Oregon Mail.

Q. I ask you next to refer to the figure below that.

A. That is the deck, the weather deck plan, looking down, as if you were looking down on the ship, directly down on it.

Q. And now the third figure down?

A. That would be the upper 'tween deck.

Q. Would this be it at the level of the upper 'tween deck?

A. Yes, looking down from above.

Q. Now I ask you to refer to the fourth figure down.

A. That would be the lower 'tween deck.

Q. Finally I ask you to refer to the bottom figure on Respondent's Exhibit A-4. [112]

A. That's the bottom of the hold and the tank tops.

\* \* \*

Q. (By Mr. Crutcher): What do these drawings represent in relation to the actual dimensions of the Oregon Mail?

A. This is a scale blueprint of the vessel.

Q. Now, Captain, I ask you to refer to the area known as the number one hold, and I wish you to point out to the Court which hold we're talking about as shown or illustrated on this diagram.

A. This is the number one hold. The holds are

(Testimony of Richard C. Wilmarth.)

numbered from forward to aft, and the foremost hold is number one. [113]

\* \* \*

Q. (By Mr. Crutcher): I ask you to refer to the top figure in the diagram marked Respondent's Exhibit A-4 and circle the term "No. 1 Hold" shown on that diagram. A. Yes.

Q. Is this the area which has previously been referred to in your testimony as the number one lower hold? A. Yes.

Q. And now, Captain, I will ask you to show to the Court the area which you examined on August 25th, and I revert back now to your previous testimony before the recess. Will you please show the Court what area you have been referring to as the area which you examined on that day after the barley had been removed?

A. Do you want me to—I have it marked in red right here.

Mr. Crutcher: I ask the Court to note the area which has been shown.

A. That would be the top figure only?

The Court: I like words and figures stated by word of mouth.

Mr. Crutcher: I appreciate——

The Court: That does me lots more good than to see—— [114]

\* \* \*

Q. (By Mr. Crutcher): Now, Captain Wilmarth, I'm asking you to refer back to this time



(Testimony of Richard C. Wilmarth.)

which you have previously mentioned when you went down into the hold. Was that during daylight hours?

A. Yes.

Q. Were the hatches open? A. Yes.

Q. Did you have any source of artificial light?

A. No.

Q. Now, did you examine the overhead area aft of the after coaming in number one lower hold?

A. Yes.

Q. Did you examine the cables? A. Sir?

Q. The wiring for the light in that area?

A. Yes.

Q. Did you examine the light fixture?

A. Yes.

Q. Now, would you please describe to the Court the purpose [115] of your examination and what you observed down there?

\* \* \*

A. We went down to see the extent of the damage and ascertain if there was any damage to the hull or structure of the vessel and just what had—a general inspection, as well as to see if the fire was completely out.

Q. Was this——

Mr. Detels: I move—never mind, I withdraw the objection.

Q. (By Mr. Crutcher): Was this in pursuance of your duties as master of the vessel?

A. Please, again?

Q. I say, was this inspection which you made in pursuance of your duty as master of the vessel?

(Testimony of Richard C. Wilmarth.)

A. Oh, yes. Yes, it was.

Q. Now, as a result of that examination did you reach a conclusion or form some opinion as to what had—I beg your pardon. That's a misplaced question.

Captain, would you describe to the Court the condition of these parts of the hold which I've mentioned at the time you made that examination in your own words, please?

A. Well, the paint was definitely scorched and black and the light itself was badly damaged and blackened and the cable was definitely black and damaged and there was a CO<sub>2</sub> pipe across the overhead that had the painting off it. [116] Otherwise there was just evidence of fire.

Q. Now, in what area or what part of the after end of number one lower hold was this condition?

A. This was on the after side of the hatch coaming in the lower hold, the lower hold hatch coaming.

Q. About how far aft of the hatch coaming did it extend?

A. Six to eight feet.

Q. And how far away from the port beam, that is the beam running aft from the port side of the hatch?

A. How far aft from this beam?

Q. Yes.

A. I would say about five to six feet.

Q. Is that the same dimension you were just mentioning?

A. Yes.

Q. All right. Now, how far did it run along the edge of the hatch coaming, if it did?

(Testimony of Richard C. Wilmarth.)

A. Inboard from that?

Q. Towards the center line.

A. I don't remember. About five or six feet, as I remember it.

Q. Did you have any way of determining how deep this fire had penetrated into the barley itself?

Mr. Detels: I will object to the question as assuming the existence of a fire which has not been testified to. [117]

Mr. Crutcher: I'll withdraw the question, your Honor.

The Court: It is withdrawn. Modify the question.

Q. (By Mr. Crutcher): I meant to say, Captain, did you have any means of determining how deep the charring had gone into the barley from the top of the barley? A. No.

Q. At the time that you examined the hold had the char been removed? I'm talking now about the charred barley. A. Most of it, yes.

Q. At that time was there any further evidence of crackling or smoking? A. Not at that time.

Q. Or heat? A. No. [118]

\* \* \*

Q. (By Mr. Crutcher): Captain, I will ask you to describe in detail the condition of the steel overhead in that area as you observed it at that time.

A. It was black and definitely burned, the paint.

Q. Now, is there a difference between blackened by smoke and burning? A. Yes.

(Testimony of Richard C. Wilmarth.)

Q. So far as this area would be concerned?

A. Yes.

Mr. Detels: I will object to that question as also calling for expert testimony with regard to the characteristics of paint.

The Court: The objection is sustained. [119] Nearly all of such objections could be obviated if Counsel would include in his question, "State if you know," and especially the last one. I am not sure that the objection would be obviated when it goes to one speaking as an expert witness.

Q. (By Mr. Crutcher): Captain, I am referring back now to your previous testimony about having observed the condition of steel plating burned by other fires, and I will ask you whether you know of your own knowledge whether there is a difference between the appearance of smoke and actual burning on the surface of painted steel plating in a vessel.

A. Yes.

Q. And what is that difference?

A. Smoke would merely discolor the paint. The paint itself would have been undisturbed underneath the soot, we'll call it, whereas burned paint definitely is burned. The paint is burned off.

Q. Now, referring to your examination of the overhead on the day of August 25, 1955, in the lower hold of the Oregon Mail aft of the hatch coaming, I ask you, did you observe, make an observation there as to whether this was smoke or whether it was a burned effect on the surface? [120]

(Testimony of Richard C. Wilmarth.)

A. It was—yes.

Q. (By Mr. Crutcher): And would you state what that was?

A. It was burned. [121]

\* \* \*

Q. I say based upon your observation of that metal surface on the overhead of number one lower hold, did you make any further examination of other metal areas in that vicinity?

A. Yes, we went around to the starboard side and looked in there to make sure there was nothing in there, and under all the other overhead beams and so forth on both sides of the girder.

Q. Did you find any evidence of burning in other areas?

A. Not of burning, no.

Q. Now, getting back to this area aft of the coaming in [122] number one lower hold on the port side, I will ask you whether as a result of your examining that overhead you formed a conclusion as to whether or not there had been a fire there?

A. Yes.

Q. This can be answered yes or no.

A. Yes.

Q. And would you state what that conclusion was? [123]

\* \* \*

A. That there had been a fire in that area.

Q. Were you able to judge the extent of that fire as far as area was concerned?

A. Yes.

Q. Was that extent approximately the same as the dimensions which you have previously testified to?

A. Yes.



(Testimony of Richard C. Wilmarth.)

Q. Were you able to judge the intensity of heat or fire in that area? A. No. [126]

\* \* \*

Q. (By Mr. Crutcher): Captain, can you state the time when it was determined that there was no further danger of combustion or fire aboard the ship? A. What was that again, please?

Q. I ask you to advise the Court when it was, that is on the 24th or 25th or 26th, that it was determined that the vessel was no longer in any danger.

(Witness refers to log book.)

A. At seven o'clock the night of the 25th the last evidence [128] of smoldering fire was put out. That was determined by us. The following day on the 26th it was inspected at nine o'clock in the morning by the Coast Guard officer. [129]

\* \* \*

Q. (By Mr. Crutcher): Captain, as a result of your inspection of the area and your experience in dealing with this combustion in number one lower hold during the week commencing on August 21st did you reach any decision or conclusion as to whether it would have been safe to continue loading and proceed to sea without combating this combustion or burning in the number one lower hold? A. Yes.

Q. And what was that conclusion?

A. That the ship was ready for sea, would be ready for sea.

(Testimony of Richard C. Wilmarth.)

Q. I think you misunderstood my question. What would have happened if you had failed to——

A. Oh.

Q. ——go down into the number one lower hold to combat the burning?

Mr. Detels: I will object to the question as calling for an expert answer from an unqualified witness.

The Court: I want to hear the question again.

(The reporter read the last question interrupted by the answer "Oh.")

The Court: The objection is overruled.

Q. (By Mr. Crutcher): Do you understand the question, Captain? A. Yes. [130]

Q. Would you please advise the Court of what in your judgment would have been the result of proceeding to sea without going down and combating this burning in the number one lower hold?

A. Well, the fire would have definitely advanced and possibly the heat would have distorted the frames, weakened the vessel, and the deep tank right abaft that compartment was filled with oil, it could have caused further very dangerous fires. In fact, the whole thing could have—the ship would have definitely been in danger.

Q. Would that danger have extended to the cargo which was then aboard the vessel?

A. Sir?

Q. I say would that danger extend to the cargo which was then aboard the Oregon Mail?

(Testimony of Richard C. Wilmarth.)

A. Oh, yes, the cargo as well as the ship.

\* \* \*

Cross-Examination

By Mr. Detels:

Q. Captain Wilmarth, you have testified today with respect to certain events occurring aboard the Oregon Mail prior [131] to the morning of August 21st. Do you recall that your deposition was taken in Seattle on the 18th of April, 1958, in connection with this case?

A. Yes, sir.

Q. Did you testify at that time that to the best of your recollection you had not been aboard the vessel as master prior to the morning of August 21st when the vessel arrived at Seattle?

A. Yes.

Q. Was the rough log of the vessel available to you at the time of the deposition to refresh your recollection?

A. Yes.

Q. Is it now your testimony that you did go aboard the vessel as master prior to August 21st?

A. Yes.

Q. Has anything been available to you to refresh your recollection which was not available to you at the time your deposition was taken?

A. Yes.

Q. What have you referred to?

A. My own papers, my pay voucher and letter of assignment to the vessel, and then my own recollection, thinking back on it.

Q. So that you have referred to administrative matters of payroll records and the like rather than

(Testimony of Richard C. Wilmarth.)

to any notes [132] or records you kept as to happenings aboard the vessel?      A. That's right.

Q. It is a fact, is it not, that at the time your deposition was taken you were unable to recall anything which had occurred on the vessel prior to August 21st?      A. Yes.

Q. Have you referred to anything which has refreshed your recollection of the events on the vessel prior to August 21st as distinguished from the fact you were aboard it?      A. Yes.

Q. What is that?

A. This deck log here before me.

Q. You had that available to you at the time your deposition was taken, did you not?

A. Yes.

Q. And you did refer to it, did you not?

A. Yes.

Q. Now, proceeding to the testimony you gave with reference to the happenings at Vancouver, B. C., on the night of August 20th, what report was first made to you which directed your attention to the smoke detector cabinet on that occasion?

A. Just that there was an odor coming from this exhaust.

Q. Who made that report? [133]

A. One of the officers.

Q. Were you present in the courtroom yesterday when the second officer, Mr. Tomlin, testified?

A. Was I here yesterday?

Q. Yes.      A. Yes.

(Testimony of Richard C. Wilmarth.)

Q. You were present in the courtroom when he was on the witness stand?

A. Yes, but I couldn't hear very well what he was saying.

The Court: I think the Court observed that the witness had great difficulty in hearing what was said in the courtroom yesterday before the witness took the witness stand today, for whatever information or reminder that may be worth to Counsel. You may proceed.

Q. (By Mr. Detels): Did you hear him testify that it was he who made the report and that he had observed smoke rather than an odor and that he reported smoke to the chief mate and yourself at that time?

A. No, I didn't.

Q. Did you yourself detect an odor in the vicinity of the smoke detector cabinet?

A. I detected an odor, yes.

Q. At that evening?

A. Yes.

Q. Was the second officer with you at the time you made that [134] observation?

A. I don't know. I don't remember which one of the officers was with me.

Q. In the ordinary course of operation is it not a fact that the air which is being drawn from the holds into the smoke detector cabinet is vented out onto the wing of the bridge without entering the wheelhouse?

A. Yes.

Q. So that any odor which may be——

A. Oh, just a minute, sir. Not on all ships.

The Court: "Not on all ships." Is that what you



(Testimony of Richard C. Wilmarth.)

said, Captain? A. Yes, sir.

Q. (By Mr. Detels): Well, with reference to the Oregon Mail?

A. It's on the outside on the Oregon Mail, yes.

Q. So that no air from the holds ordinarily enters the wheelhouse without the performance of some operation at the smoke detector cabinet?

A. Yes.

Q. So that it is impossible to detect an odor coming in through the smoke detector unless a valve is opened to introduce the air into the wheelhouse rather than permitting it to exhaust onto the wing of the bridge? A. Yes.

Q. Did you turn that valve? [135]

A. No. We were outside, and there's a sliding valve on the exhaust pipe which lets it out right directly down on top of you, and that's where we —when I went up to look at it was opened that.

Q. Is that inside the wheelhouse or outside?

A. Outside.

Q. Well, did you detect an odor inside the wheelhouse itself at any time?

A. I don't recall it.

Q. So that the observation you made was made on the wing of the bridge? A. Yes.

Q. Was it customary aboard the Oregon Mail when you were the master for the watch officers to turn the valve which vented the air from the hose into the wheelhouse with any regular frequency?

A. No. There's no valve that you're speaking of

(Testimony of Richard C. Wilmarth.)

into the wheelhouse. It's in the smoke detector system itself.

Q. Well, if I have understood your testimony——

A. Sir?

Q. I say if I have understood your testimony——

A. Yes.

Q. ——no odor was detected in the wheelhouse itself because the air coming from the hose was never exhausted into the wheelhouse at any time on the night of August 20th. [136]

A. It's exhausted into the cabinet of the detector system which is in the wheelhouse.

Q. And that has a glass cover over it, does it not?

A. It has what?

Q. Does that not have a glass cover on it?

A. Yes.

Q. Does that air ever enter into the wheelhouse at large or does it remain in the cabinet and then pass out onto the wing of the bridge?

A. As far as I know it remains in the cabinet or passes out through. It doesn't come into the pilothouse.

\* \* \*

Q. Captain Wilmarth, referring again to the smoke detector cabinet in the wheelhouse of the Oregon Mail, I ask you if it is possible to detect the odors in the air which is passing through the smoke detector cabinet from inside the wheelhouse?

A. Inside the wheelhouse?

Q. Yes. A. I don't think so.

Q. So that in order for anybody to detect an

(Testimony of Richard C. Wilmarth.)

odor they would have to go out on the wing of the bridge?      A. Yes.

Q. And they would then have to turn a valve or make some manual operation on the mechanism in order to sample the air that was coming through the cabinet?

A. No. No, it comes out anyhow. It would come out anyhow, but you can open that valve and make it come out a lot [138] stronger.

The Court: Where would it come out, with reference to——

A. As I remember now it comes right out the end of the pipe, but there's a valve——

The Court: Where is the pipe end with reference to the deck?

A. It's right outside the pilothouse on the port wing of the bridge.

The Court: So it is near the bridge, then; if it is not inside the bridge it is near the bridge, is that right?      A. Yes, sir.

The Court: You may inquire.

Q. (By Mr. Detels): Did you detect an odor at any time inside the wheelhouse?

A. I don't recall that I did.

Q. In view of the fact that on April 18, 1958, you were unable to recall that you were aboard the ship on the evening of August 20th, are you able to state positively now with respect to the evening of August 20, 1955, that you did not observe smoke?

A. I did not see smoke, no.

Q. Can you describe the odor which you did detect?

(Testimony of Richard C. Wilmarth.)

A. No, I can't describe it in words. [139]

Q. Had you on any previous occasion smelled the odor of burning grain?

A. Come again, please?

Q. Had you ever prior to this time, August 20, 1955, smelled burning grain to your knowledge?

A. No, I never had.

The Court: How long have you been working on a ship?

A. On a——

The Court: Any ship. How long has it been since you worked on your first ship?

A. Thirty years ago, thirty-two years ago.

The Court: You had worked on all sorts of ships carrying cargo, had you?

A. Yes, sir.

The Court: You may inquire.

Q. (By Mr. Detels): Now, as a result of making this observation of an odor did you direct that anything be done at that time?

A. What is it, please?

Q. Did you issue any order or did you yourself do anything as a result of determining that there was an odor coming from the smoke detector onto the wing of the bridge?

A. Yes, we did. As I say, I ordered the officers to keep a continuous watch or a frequent watch on the smoke [140] detector, and then later on we got some grain out by hand and we took it down to the galley stove and heated it up and smelled it, just to see if we could get the same smell out of it.

(Testimony of Richard C. Wilmarth.)

Q. When was that done, Captain?

A. I don't remember, but it was right around that period there. I don't remember the exact time.

The Court: Where were you on the ship when you first smelled the smoke, smelled the smoke?

A. Well, I was either in my room or on the bridge with the pilot. I don't remember, Your Honor.

The Court: You may inquire.

The Witness: And I was called by the officer that called my attention to it.

Q. (By Mr. Detels): Did you yourself take any part in this attempt to determine by using a handful of barley what the odor of that would be if it were subjected to heat?

A. Yes, sir.

Q. And you have no recollection now of when that was done?

A. No, I don't.

Q. Can you state whether or not it was after the vessel arrived in Seattle on the morning of August 21st?

A. I don't remember when it was, whether we were still en route from Vancouver, B. C., or whether we were in port.

Q. What odor did you detect when you subjected the barley [141] to heat on the stove?

A. It did smell very similar to what we were smelling except the other came through a long pipe and we didn't know, but there was a similarity of odors.

Q. Who participated in making that experiment?

A. I don't remember, but presumably the chief mate and myself.



(Testimony of Richard C. Wilmarth.)

Q. Do you recall whether or not that was before Captain Greenwood came aboard the vessel?

A. No, sir, I don't recall that.

The Court: Do you know of Captain Greenwood's career as a seafaring man or man interested in and having experience in ocean shipping affairs?

A. No, sir, I don't.

The Court: You do not know anything about his waterfront experience before he became a port captain?

A. I believe he was in British ships before. That's all I know.

The Court: You may inquire.

Q. (By Mr. Detels): To your knowledge was the smoke detector apparatus concentrated on the line from the number one lower hold on the evening of August 20th at Vancouver, B. C.?

A. We did it, we went through all the various holds and finally found it in number one then.

Q. I'm referring now to closing the valves on the air suction [142] lines leading from all other compartments of the vessel except the number one lower hold, and I'm asking you if the detector was concentrated on the suction line from the number one lower hold on the night of August 20th.

A. I don't remember exactly when we did it, whether we did it then or the 21st. It probably would be in the log.

Q. Now, was any report made to you on the evening of August 20th to which you have not testified already?

A. I don't think so.

(Testimony of Richard C. Wilmarth.)

Q. Did you make any report of the condition which you observed to the offices of American Mail Line prior to the time that the vessel arrived in Seattle on the morning of August 21st?

A. No.

Q. Did the information which you had which you obtained by detecting the odor in the vicinity of the smoke detector indicate to you on the evening of August 20th that there was damage being done to the barley in the number one lower hold?

A. As I said before, we hadn't determined what this odor was for sure, so we didn't know at that time whether there was any damage to the barley or not, on August the 20th.

Q. Did you take any steps other than what you have previously mentioned to determine whether or not that barley was [143] being damaged at that time?

A. Not at that time.

Q. There is a shore telephone connection aboard the ship while it's in port at Vancouver, B. C., is there not?

A. Yes.

Q. And there was on this particular occasion?

A. (Witness nods his head.)

Q. Your answer was yes?

A. Yes.

Q. Did you use that telephone to attempt to communicate this information to the port captain or any other official of the American Mail Line?

A. No.

Q. After you detected this odor the vessel continued to load cargo at Vancouver, B. C., did it not?

A. Well, that I can't remember, exactly when the

(Testimony of Richard C. Wilmarth.)

smoke was first reported to me, or the odor was first reported to me.

Q. Well, now, are you sure that it was an odor and not smoke that was reported to you?

A. He reported that there was a definite odor, and that it was probably smoke. That's the way it was reported to me, but I don't remember whether it was when we were coming down from Vancouver or when we were actually in port. [144]

Q. Well, is it your practice to read the entries in the rough deck log for a particular day prior to signing that page of the log? A. Usually, yes.

Q. Did you do so with respect to the entries in the log for Saturday, August 20, 1955?

A. I presume I did. I don't remember.

Mr. Detels: May the witness be handed Libellant's Exhibit 1?

The Court: That will be done.

(The exhibit was handed to the witness.)

\* \* \*

Q. (By Mr. Detels): I apologize, Captain. There appear to be two sets of pages for the date August 20th, and I'm referring now to the entry on the left-hand side of the second series of pages under the time 1800. Does that refresh your recollection as to the time when this condition was reported to you?

A. It doesn't ring a bell with me personally, no, the fact that it was at that time.

Q. Well, are you able to recall when the ship

(Testimony of Richard C. Wilmarth.)

discontinued the loading of cargo at Vancouver on August 20th?

A. No, she continued to load cargo in Vancouver.

Q. Loading was not discontinued as a result of this observation or finding? A. No.

The Court: What is your information if you have any, as to the first date in August on which this smoke was first detected on the smoke indicator or otherwise?

A. August the 20th. [146]

\* \* \*

Q. (By Mr. Detels): Now, when the vessel arrived at Seattle, as I understand it on the early morning of August 21, 1955, did you make any report to any shore representative of American Mail Line? A. Not when we arrived.

Q. Did you make any report at any time on that day?

A. Yes, at nine o'clock that morning. [147]

Q. And how did you make that report?

A. I telephoned Captain Greenwood.

Q. And he is the port captain?

A. Yes, sir.

Q. Is he the official to whom you as the master of the vessel are responsible? A. Yes.

Q. What did you report to him?

A. I said, "We have all the indications of a fire in number one lower hold."

Q. Did he subsequently come aboard the vessel himself on that morning? A. Yes.

Q. Now, during the day of Sunday, August 21st,

(Testimony of Richard C. Wilmarth.)

the ship continued to load cargo on her normal schedule, did she not?      A. Yes.

Q. And that is also true as to the 22nd of August, the following day?      A. Yes.

Q. At least until some time in the afternoon, is that not correct?      A. Yes.

Q. So that the first time that the ship departed from her normal schedule by reason of anything which had been observed or found aboard the vessel was at 1900 hours [148] on August 22nd, was it not?

A. At what hours?

Q. 1900.

A. No, we stopped loading at 1545.

The Court: May I ask you again after referring to the A-1 exhibit, Respondent's Exhibit A-1, a log book, do you still say that the first time you observed, whether you smelled it or saw it indicated on a register of some sort, that smoke in that hold was on what date? State the date again?

A. August the 20th.

The Court: That is the first date that you observed that smoke?

A. Yes, sir.

\* \* \*

Q. (By Mr. Detels): Well, perhaps I should put it this way, Captain: Loading was discontinued at approximately 1545 hours?      A. Yes.

Q. Or 3:45 p.m. on Monday, August 22nd?

A. Yes.

Q. Insofar as the safety of the cargo was concerned was anything done prior to that time and



(Testimony of Richard C. Wilmarth.)

date by reason of the observations made at Vancouver, B. C., on the evening [149] of the 20th?

A. Well, we were already discharging the cargo in number one.

Q. When did that commence?

A. Well, that—apparently here—(referring to log book)—1300 on the 22nd.

Q. Captain, referring to the left-hand side of the log book for Monday, August 22nd, and if there are two pages it may be on the second series of pages, will you read the entry under the time 1545?

A. (Reading): "Received instructions from AML office to stop loading all cargo except reefer."

Q. And was it subsequent to the receipt of that instruction that the loading of cargo was discontinued?

A. The loading was discontinued then, yes.

Q. Now, I think you testified previously that it was you who made the decision or determination to stop loading cargo on the afternoon of August 22nd?

A. Yes.

Q. Does the entry which you have just read refresh your recollection as to whether or not that decision was made by shore personnel of the American Mail Line?

A. It was my decision. We had conferred in my quarters, but it was my decision to stop the loading, my recommendation.

Q. Well, who issued the instructions to the officer on watch to discontinue the loading? [150]

(Testimony of Richard C. Wilmarth.)

A. Well, during the loading, why the chief officer——

The Court: No——

A. Sir?

The Court: Just answer it directly. Who issued the orders to the people on the dock to stop bringing cargo aboard?

A. The chief officer.

Q. (By Mr. Detels): Who instructed him to see that that was done? A. I did.

Q. I believe you testified that an effort was made to determine the temperature of the barley in the number one lower hold by means of dropping a thermometer into the hold? A. Yes.

Q. And what date was that done?

A. That was on Sunday, August the 21st.

Q. Were you present when that was done?

A. Yes.

Q. Was it done at your direction? A. Yes.

Q. Do you recall who did it? A. No.

Q. Can you state what finding was made as to the temperature of the cargo in the number one lower hold at that time? [151]

A. What was that again, please?

Q. What readings or what temperature was ascertained by that means at that time?

A. Oh. As I remember there was no abnormal temperatures that showed on that method of trying to get the temperature.

Q. And that was done by dropping a thermometer designed for that purpose down the sounding pipes

(Testimony of Richard C. Wilmarth.)

of the vessel from the deck into the number one lower hold?      A. Yes.

Q. So that the thermometer would be on the grain or in the grain or barley for a period in order for you to be able to get a reading?

A. Yes.

Q. Captain, have you had any training in metallurgy?      A. No.

Q. Now, you have used the word "fire" several times in your testimony, and I would like to have you explain what you mean when you use that word?

A. Fire?

The Court: Fire.

A. Whenever anything is burning it's on fire.

Q. (By Mr. Detels): Well, does that include the notion of flame, visible flame, to your mind?

A. Well, not necessarily, no, but it usually does, yes.

Q. Now, did you see any flame at any time? [152]

A. No.

Q. Now, on the other occasions to which you testified when you observed the results of burning on metal surfaces, did you observe a flame?

A. No.

Q. You did not actually witness any flame on those other occasions on other vessels?

A. On other vessels?

Q. Yes.      A. Yes, I saw flame then.

Q. So that the record may be clear, I've been inquiring now with reference to the occasions about which Mr. Crutcher inquired when you had seen

(Testimony of Richard C. Wilmarth.)

the effects of fire in paint lockers and in other spaces on vessels at different times than the time we are concerned with on the Oregon Mail?

A. Yes.

Q. And I'm asking you if you saw a flame on those occasions? A. Yes.

Q. I see. Was that what indicated to you that there was a fire on each of those occasions?

A. Now again, please?

Q. Was your observation of flame the fact which satisfied you that there was a fire on those occasions?

A. Yes.

Q. Do you have any knowledge of the temperature at which [153] barley will become scorched or blackened in appearance? A. No.

Q. Do you have any knowledge of whether or not that can occur without flame? A. No.

Q. Do you have any knowledge of whether or not paint can become scorched or blackened in the absence of flame?

A. By overheating it can, yes, depending on the type of paint.

Q. You can produce this black and scorched effect by heat alone without flame? A. Yes.

Q. Have you observed that in your experience?

A. Yes.

Q. And that would be true as to painted metal surfaces such as you had in the number one lower hold of the Oregon Mail?

(Testimony of Richard C. Wilmarth.)

A. Yes.

Q. (By Mr. Detels): Have you observed at any time conditions similar to those that you observed in the lower hold of the Oregon Mail when you made your inspection after the [154] barley was discharged to have been produced by heat in the absence of flame? A. Yes.

Q. To your knowledge was any effort made to obtain the temperature of this grain in the number one lower hold after the time to which you have testified on August 21st? A. No.

The Court: Was there any attempt to test the temperature in the hold above and around the grain before you observed the smoke, at any time between that time and the time when the barley was received on board the vessel?

A. No, I don't recall any.

The Court: Was there any time when you could have made a test of the temperature of the atmosphere in and about the grain?

A. Yes.

The Court: By "atmosphere" I mean the air insofar as it concerns the body of the grain itself.

A. Yes.

The Court: Was that determined, do you know?

A. I don't recall that it was. As I remember there was no indication on the thermometers of any need.

The Court: My question was, is there a record or do you otherwise know that some person on behalf of [155] the ship or somebody else tested the tem-



(Testimony of Richard C. Wilmarth.)

perature in and about the wheat at any time, and if so, when and with what results, after the grain was loaded on board the vessel and before you observed the smoke.

A. No.

(Brief pause.)

Mr. Detels: May I proceed, your Honor?

The Court: You may.

Q. (By Mr. Detels): Well, to your knowledge the only time that a temperature reading was taken of the barley in the number one lower hold was on August 21st?

A. Yes.

Q. Was there anything which prevented the taking of temperatures at any prior or any subsequent time?

A. No.

Mr. Detels: No further cross-examination.

The Court: Any redirect?

Mr. Crutcher: Yes, your Honor.

The Court: Briefly, please, as briefly as possible.

Mr. Crutcher: Certainly.

### Redirect Examination

By Mr. Crutcher:

Q. Just a moment ago, Captain, you testified that there was [156] nothing to prevent you from taking temperatures in the lower hold at any time, and I assume now you're referring to the time before the cargo was discharged in the number one hold.

A. Yes.

(Testimony of Richard C. Wilmarth.)

Q. Before the carbon dioxide was applied. Are there any sounding pipes in the after end of the hatch coaming in the number one lower hold?

A. As I remember, there are.

Q. Where are the sounding pipes located in the lower hold?

A. On a C-3 I think they're on the outboard side of the deck, just a little forward of the masthouse. It would be right back in the after corner of the hatch, the hold.

Q. Yes, and would that be near this cargo light that you previously described on direct examination?

A. No.

Q. Where did the sounding pipes go? That is, do they end at the top of the hatch or do they go to the bottom?

A. They go from the weather deck right to the bottom of the ship.

The Court: Is there not a gap in it? When you get to the top of an open deck this sounding pipe does not continue on through the open deck, does it?

A. Right to the deck, yes, sir. It has a screw plug on the top and you open it up with a [157] screw plug.

The Court: Is there a bulkhead or is there something else to attach the pipe to so that the pipe will not be in the way of the handling of cargo?

A. It's over in the corner of the hatch, sir, in the corner of the hold, so it's out of the way of the cargo. [158]

(Testimony of Richard C. Wilmarth.)

Q. (By Mr. Crutcher): Captain, at the time that you dropped the thermometer into the sounding pipe was the barley still in place in the number one lower hold as it had been loaded at Vancouver, Washington? A. Yes.

Q. And was the other cargo still in place in the lower 'tween deck? A. Yes.

Q. Was there any—

The Court: In taking the temperature with a thermometer inside of a sealed pipe that is sealed all the way down between the top end of the sounding pipe on the top deck or wherever it ends at its topmost end and extends all the way down to the lowest point in the ship to which it goes, if you put a thermometer inside that pipe you would get the temperature inside the pipe, you would not get the temperature in the cargo space, would you?

A. If there was a fire in there, sir, the [159] fire would naturally heat the pipe adjacent to the— if there was any excess heat it would heat that pipe.

The Court: Is the sounding pipe used to obtain the temperature in the air in the cargo space as distinguished from the cargo itself?

A. No.

The Court: You may proceed.

Q. (By Mr. Crutcher): Thank you, Captain. Was there any way in which you could see this fire area which you described in your direct examination at any time before the 25th of August?

A. No.

Q. Why was that?

(Testimony of Richard C. Wilmarth.)

A. We couldn't get to it. We had to discharge all of the lower 'tween deck and all the grain that was in the lower 'tween deck to get down to the lower hold.

Q. Was there any other means of access to the lower hold?      A. No.

Q. Captain, there's possibly some confusion in my mind with respect to this matter of smelling odor in or out of the pilothouse. The following question, which is my last question, has to do with that subject. Are the doors of the pilothouse left open in the summertime when the vessel is in port?

A. Yes—not always. It depends on what port we're in, but [160] they were in Seattle, I'm sure.

Q. Well, how about Vancouver, British Columbia?      A. Yes.

Q. Is it possible that air from outside would pass through the pilothouse?      A. Yes.

Mr. Detels: I'll object to that question as leading and speculative.

The Court: That objection is overruled.

\* \* \*

### Recross-Examination

By Mr. Detels:

Q. Do you have any recollection as to whether the pilothouse door was open or closed on the evening of August 20th?      A. No, I don't. [161]

\* \* \*

(Witness excused.)

(Testimony of Richard C. Wilmarth.)

The Court: Call the next witness.

Mr. Crutcher: May it please the Court, we would next like to offer a deposition, and I will ask Mr. McMullen to take the stand for the purpose of reading the answers. [162]

\* \* \*

Mr. Crutcher: Thank you, your Honor. I'm now commencing with the deposition proper, and I would point out to your Honor that it was stipulated between the parties, as shown in this deposition, that all objections except to the form of the question and the responsiveness of the answer were reserved until time of trial. [163]

\* \* \*

## DEPOSITION OF RODNEY PALMER

"Q. Will you state your full name, Mr. Palmer?

"A. Rodney Palmer.

"Q. Where do you presently reside?

"A. Little Valley, Utah.

"Q. Were you the First Officer aboard the SS Oregon Mail on Voyage 33, being a voyage commencing about August, 1955? A. I was.

"Q. When did you start to sea, Mr. Palmer?

"A. In 1940.

"Q. In what capacity did you start?

"A. As an ordinary seaman.

"Q. Did you have any special education for the merchant marine thereafter?



(Deposition of Rodney Palmer.)

“A. I went to maritime school in Alameda and received my [164] license in 1944.

“Q. And which license is that?

“A. I received my Third Mate’s license at that time.

“Q. And subsequently did you acquire other licenses as a deck officer?

“A. Yes, I acquired Second Mate, Chief Mate and Master’s license.

“Q. Those licenses were issued by the United States Coast Guard?      A. They were.

“Q. What type of Master’s license do you presently hold?

“A. An unlimited master.

“Q. Did you continuously follow the sea after you commenced shipping as an ordinary seaman?

“A. Yes, I did.

“Q. On what types of vessels have you served?

“A. Both freighters and passenger ships in the Coastwise trade and offshore and foreign trade.

“Q. When did you start work with American Mail Line?      A. In 1951.

“Q. In what capacity did you go to work for that firm?      A. Junior Third Mate.

“Q. What trades did you operate while with the American Mail Line?      A. Trans-Pacific. [165]

“Q. Would you state how many of their vessels you served on?

“A. Do you want the names of them, or just the number?

“Q. Well, no, the number.      A. Four.

(Deposition of Rodney Palmer.)

“Q. Were those vessels what are called general cargo ships? A. Yes, they are.

“Q. When did you go aboard the SS Oregon Mail, about? A. In 1954.

“Q. In what capacity did you serve aboard that vessel? A. Chief Mate.

“Q. What kind of a ship is the Oregon Mail?

“A. A standard C-3 cargo freighter.

“Q. How many holds?

“A. Five hatches.

“Q. What sort of motive power?

“A. It is a gear steam turbine.

“Q. Do you recall when she was built?

“A. 1945, by Ingalls Shipyard.

“Q. With respect to Voyage 33, can you state where and when that voyage started?

“A. It commenced in August, 1955, at Portland, Oregon.

“Q. Will it assist you to refer to the deck log book for that voyage?

“A. It would, for the exact dates.” [166]

\* \* \*

“Q. Now, Mr. Palmer, perhaps by referring to the smooth log book which has been marked as Respondent's Exhibit 'A' which you have before you, you can identify the exact time and date when this Voyage 33 commenced.

“A. It commenced at midnight on Saturday, August 13, 1955.

“Q. At what port?

“A. Portland, Oregon, Terminal 1, Berth 7.

(Deposition of Rodney Palmer.)

"Q. Will you state whether or not you were then aboard the ship, that is, serving aboard the ship at the commencement of the voyage?

"A. Yes, I was.

"Q. And what cargo generally was loaded at Portland, Oregon?

"A. General cargo mostly consisting of lumber, flour. That would be the cargo at Portland."

\* \* \*

"Q. (By Mr. Crutcher): When did you finish loading at Portland, Mr. Palmer?"

\* \* \*

"A. We finished loading at 9:00 o'clock on the evening of Tuesday, August 16, 1955. [167]

"Q. And where did the vessel go from there?

"A. It left the following morning, August 17 and went to Terminal 2 at Vancouver, Washington.

"Q. And what sort of a facility is that?

"A. It is a grain elevator.

"Q. And did you take on cargo at that port?

"A. That we did. We loaded two hatches of grain at the grain elevator.

"Q. Which hatches were those?

"A. No. 1 and No. 5.

"Q. What type of grain was that?

"A. A load of barley.

"Q. Now, with reference to No. 1 lower hold, before that was loaded, did you have occasion to go into that hold?      A. Yes, I did.

(Deposition of Rodney Palmer.)

“Q. What was the purpose of your going into the hold?

“A. It was a routine inspection of the hold required preparatory to loading cargo, and also to inspect the shifting boards that are installed in the cargo for the safety of the vessel.

“Q. Can you describe the condition of the hold at that time?

“A. It was clean and seaworthy condition; all shoring, wire and structural were intact.” [168]

\* \* \*

“Q. (By Mr. Crutcher): I will ask you to rephrase your answer, Mr. Palmer, that is, your answer to this same question, namely, a general description of the hold. Can you state simply what you visually observed rather than what you concluded—omitting any conclusion you may have drawn as to the seaworthiness of the vessel, I will ask you more specifically first of all, was the hold clean at that time? A. Yes, it was.

“Q. Had it been cleaned in preparation for receiving this cargo? A. It had.

“Q. Did you examine the lights and wiring in that hold at that time? A. Yes.

“Q. Would you describe generally what the lights and wiring consisted of in that hold?

“A. Consisted of reflector-type flood lights and corrugated cable wiring.

“Q. Did the wiring lead to the flood lights?

“A. It led to the flood lights.

(Deposition of Rodney Palmer.)

“Q. And how many lights are there in that hold, or were at that time?

“I think you understand that whenever I ask you [169] about the condition of the vessel I am now referring to this occasion.

“A. There were eight lights.

“Q. And were they all of this type?

“A. Yes, they were.

“Q. Are these portable lights or are they fastened in some way to the vessel itself?

“A. They were permanent installations.

“Q. And where are they in the hold?

“A. They were located on the coamings on the overhead—they were fastened to the deck head behind the coamings, approximately 2 feet from the coamings.

“Q. Were the lights on at the time you examined the hold?      A. Yes, they were.

“Q. Did anyone else inspect the hold at that port?

“A. The cargo surveyor for the Columbia River inspected it also.

“Q. Do you recall his name at this time?

“A. It is either Captain Bennett or Captain McClellan. There were two surveyors at the time, and I believe it was Captain Bennett.

“Q. Is he with National Cargo Bureau?

“A. Yes.” [170]

\* \* \*

“Q. Did Captain Bennett make any statement to you regarding the condition of the hold, or con-



(Deposition of Rodney Palmer.)

fer with you in any way at that time? I am asking, did he call your attention to any condition to which he objected?      A. No.

“Q. Now, after you had been in that hold, how soon after did they start loading?

“A. May I refer to the log book?

“Q. Yes, if it will refresh your recollection.

“A. (Referring to log book): It was approximately an hour after we made the inspection that we started to load.

“Q. And how do they load grain from that terminal?      A. They use spouts.

“Q. Was there anyone in the hold during the time they were pouring the grain in?

“A. No, there is not.

“Q. Did that grain fill the No. 1 lower hold?

“A. That filled the lower hold and flowed over to the lower 'tween deck. [171]

“Q. Now, after you were in the hold and before they started loading, did you turn out the lights that were in there?      A. Yes, I did.

“Q. Where is the switch box for the No. 1 lower hold?      A. It is located at No. 1 masthouse.

“Q. Is that what is sometimes referred to as a resistor house?

“A. It is commonly called both the same.

“Q. Where is that located?

“A. Between No. 1 and No. 2 hatch, on deck.

“Q. Would you describe generally what sort of a house it is?

“A. It is a steel enclosure with a single water-

(Deposition of Rodney Palmer.)

tight opening with a screen—with a screen door installed inside the water-tight door.

“Q. Is there a lock on the screen door?

“A. Yes, there is.

“Q. What is the purpose of that lock?

“A. To keep trespassers and unauthorized persons out of the resistor house.

“Q. Did you have a key to that lock?

“A. I did.

“Q. Did the electrician also have a key?

“A. He had.

“Q. In connection with turning off those lights, did you take any other precautions?

“A. Yes, I notified the electricians to pull the fuses to [172] No. 1 hatch and No. 5 hatch also.

“Q. And was that order carried out?

“A. It was.

“Q. Now, how long did it take to load this barley into No. 1 lower hold?

“A. May I refer to the log book again?

“Q. Yes, if it will refresh your recollection.

“A. (Referring to the log book): At 4:00 p.m. on August 17, the grain was all loaded in No. 1 hatch.

“Q. Thereafter were the hatch covers put back on?

“A. They were put on the upper 'tween deck and the main deck.

“Q. Was there a hatch cover on the No. 1 lower hold hatchway?

“A. No, just the beams were put in.

(Deposition of Rodney Palmer.)

“Q. Were those put in before the grain was poured in?

“A. The beams were left in during the operation.

“Q. And what was the purpose of leaving the beams in?

“A. For the structural strength of the vessel.

“Q. And after you completed loading this grain, did you load any other cargo at Vancouver?

“A. No, upon completion of the loading of grain at Vancouver, that is all of the cargo we loaded there.

“Q. And from that place, where did the vessel go?

“A. Shifted to the Weyerhaeuser dock at Longview, Washington.

“Q. Was any cargo loaded into No. 1 hold at Longview?

“A. Yes. There was a load of lumber that was loaded in the [173] lower 'tween deck on top of the barley.

“Q. Was there anything put between the barley and the lumber?

“A. There was dunnage installed.

“Q. Over the top of the grain?

“A. The top of the grain was dunnaged off.

“Q. Were you in the No. 1 hold during that time? No. 1 lower 'tween deck?

“A. Yes, when they started the operation.

“Q. And when was that? About what time of day?

(Deposition of Rodney Palmer.)

“A. It was on the morning of the 18th, 8:00 o’clock in the morning.

“Q. How long did your loading at Longview continue?

“A. May I refer to the log book?

“Q. If it will refresh your memory.

“A. (Referring to log book): We were at Longview at the Weyerhaeuser Mill Dock from August 18th until 12:30 on Friday, August 19.

“Q. And how long during that time did the loading of No. 1 hold continue?

“A. It was continuous through 8:00 o’clock, August 18th to 8:00 o’clock on August 19.

“Q. Who was on watch during that night?

“A. We had a relief mate on watch.

“Q. What was his name?

“A. W. C. Hardie. [174]

“Q. How was the relief mate furnished to the vessel at Longview? Does he come through the Portland hiring hall?

“A. Through the hiring hall in Portland.

“Q. Is he a member of the Masters, Mates & Pilots Union?      A. He is.

“Q. Were you on duty that night?

“A. No, I wasn’t.”

\* \* \*

“Q. At this time, do you recall any particular discussion with Mr. Hardie?      A. No.

“Q. Would you state what the custom is with regard to instructing the night mate as to the duties

(Deposition of Rodney Palmer.)

to be performed after the regular working hours of the vessel's own deck officers?

"A. To shut off cargo that was being loaded at sunset; turn on all deck lights and the necessary lights in the hold for safety, for the safety of long-shoremen; then at daylight to turn off all the lights.

"Q. How are these instructions given to the night mate, customarily?

"A. Customarily by the Chief Officer—he has a night order book that they will leave with the night mate certain standing rules in there, that are incorporated in the [175] rules.

"Q. Was this practice followed aboard the Oregon Mail?      A. Yes, it was.

"Q. And after the loading of the No. 1 hold was completed, was there any further activity at Long-view before the vessel departed from that port?

"A. Yes, there was.

"Q. Would you describe generally what that activity was?

"A. Loading the deck load on the forward deck.

"Q. Was that over the No. 1 hatch?

"A. It was on the wings.

"Q. Were the hatch covers replaced on No. 1 lower 'tween deck and No. 1 main deck before that deck cargo was put on?

"A. Yes, they were.

"Q. Is that work under your supervision?

"A. Yes.

"Q. Now, when was this work completed?



(Deposition of Rodney Palmer.)

“A. May I refer to the log book?

“Q. Certainly.

“A. Referring to log book): At 5:00 o'clock that morning, August 19, the hatches were covered. At 8:00 o'clock they secured the tarpaulins that were on the hatch. Then they loaded on the deck load after that.

“Q. Would you have had occasion to look into the No. 1 hold or No. 1 hatch before the hatch cover was put back in [176] place? A. No.

“Q. Where did the vessel go after leaving Longview? A. Sailed for Vancouver, B. C.

“Q. At what time did it sail?

“A. At 12:30 p.m. on August 19th.

“Q. Can you describe the weather that prevailed during the loading at Longview?

“A. (Referring to log book): Referring to log book, ‘scattered clouds, partly cloudy.’ Partly cloudy and scattered clouds.

“Q. What was the weather on the voyage to Vancouver, British Columbia? A. Clear.

“Q. Were there heavy seas?

“A. No seas, various winds, varying from calm to light airs, force 1 or 2.

“Q. When did you arrive in Vancouver, British Columbia?

“A. Well, we were alongside the dock at 11:38 on Saturday, August 20.

“Q. Was that 11:38 a.m.?

“A. 11:38 a.m.

“Q. Where did you berth at Vancouver?

(Deposition of Rodney Palmer.)

"A. Terminal Dock.

"Q. What was the purpose of calling at Vancouver, British [177] Columbia?

"A. To load general cargo, consisting mostly of flour.

"Q. Was there any cargo loaded in the No. 1 hold?

"A. Yes, they loaded cargo into No. 1."

\* \* \*

"Q. Would it assist you to refer to the stowage plan for that loading?

"A. That would be a little clearer."

\* \* \*

Mr. Crutcher: At this point I said, "Would you please mark that as Respondent's Exhibit 'B'?" Whereupon, a stowage plan produced by Counsel was marked as Respondent's Exhibit B. Your Honor, I think it will be stipulated that the paper which we have here is that same exhibit.

Mr. Detels: It will be [178]

\* \* \*

The Clerk: It will be marked Respondent's Exhibit No. A-5.

(A cargo plan was marked Respondent's Exhibit No. A-5 for identification.)

\* \* \*

"Q. Now, Mr. Palmer, I am handing you a paper which has been marked for identification as Respondent's Exhibit 'B,' being marked in the upper

(Deposition of Rodney Palmer.)

right-hand corner. I will ask you whether you can identify this piece of paper?

“A. It is the Cargo plan for the Oregon Mail, Voyage 33.

“Q. Now, if it will assist you to refer to the stowage plan [179] for No. 1 hold, if you have anything you can add to your answer, you are free to do so.”

Mr. Crutcher: This refers to a previous answer, your Honor, which is not included in this present deposition, or I should say in the reading of this deposition.

The Court: Kindly proceed with as few explanations as possible. Just go right along.

“A. Well, as to the cargo plan, the only cargo loaded at Vancouver was No. 1 upper 'tween deck.

“Q. And what cargo was that?

“A. A load of flour.

“Q. Where was that stowed in No. 1 upper 'tween deck?

“A. In the forward trunk, No. 1 upper 'tween deck.

“Q. At this time then would you describe again just generally the cargo that was loaded in No. 1 lower hold, No. 1 lower 'tween deck, No. 1 upper 'tween deck?

“A. No. 1 lower hold was bulk barley; the lower third of No. 1 lower 'tween deck consisted of the same cargo with lumber on top of the barley.

“It states that on top of the lumber there was

(Deposition of Rodney Palmer.)

flour loaded, a small amount of flour was loaded on top of the lumber in the lower 'tween deck.

"Now, the upper 'tween deck——"

The Court: Mr. Crutcher, proceed with Line 24 [180] if you wish to.

Mr. Detels: I would like to interpolate here. (Reading) "Mr. Crutcher, before the witness refreshes his recollection any further by means of the cargo plan, I would like to have him testify, if he knows, when and by whom it was prepared.

"Mr. Crutcher: Well, can we finish this first?

"Mr. Detels: All right.

"Q. (By Mr. Crutcher): Just to complete this, was there any cargo as of this time, and I refer now to the time when loading was completed at Vancouver, B. C., in the No. 1 upper 'tween deck?

"A. Yes, there was cargo in there from Portland, lumber, in the wings; in the forward end there was flour loaded at Portland; in the after trunk was cargo loaded at Portland, general cargo."

\* \* \*

"Does the Chief Officer have anything to do with the preparation of the stowage plan on your west-bound voyages? A. No, he doesn't.

"Q. After the stowage plan is prepared, are you furnished with a copy of it? A. Yes. [181]

"Q. Is that a regular part of the vessel's records? A. Yes, it is.

"Q. Now, on Voyage 33 westbound, were you furnished with a copy of the stowage plan?

(Deposition of Rodney Palmer.)

“A. I was.

“Q. Did you or do you have any occasion to verify or corroborate what is shown on the stowage plan? That is, in the course of discharging, do you refer to the stowage plan to find out where the cargo is? A. Yes, I do.

“Q. Are you in a position at this time to recognize this particular copy as the copy of the stowage plan for the SS Oregon Mail, Voyage 33, west? A. Yes, it is.

“Q. By ‘this paper’ of course I am referring to a piece of paper which has been previously marked for identification as Respondent’s Exhibit ‘B,’ the paper which you have in your hand.

“After you finished—I will preface that question by, when did you finish loading at Vancouver, B. C.?

“A. Shall I refer to the log book?

“Q. If it will refresh your recollection.

“A. (Referring to log book): We left Vancouver at 10:25 p.m. on August 20, which was Saturday. [182]

“Q. While you were at Vancouver, B. C., did you receive any report that smoke had been detected in the smoke detector? A. I did.”

\* \* \*

“Q. Now, about when was that, or at what time did you receive that report?

“A. At 6:00 p.m. on August 20th.

“Q. From whom did you receive that report?

“A. The Second Mate.



(Deposition of Rodney Palmer.)

“Q. What is his name?

“A. Norman Tomlin.

“Q. Had there been any previous reports or indication of any kind of fire on board this ship?

“A. No.

“Q. What action did you take upon receiving that report?

“A. Made a visual inspection of all acceptable cargo compartments and spaces aboard the ship.”

Mr. Crutcher: Your Honor, I believe the word probably was misreported. It should read “accessible cargo compartments.”

Mr. Detels: I agree with the change.

The Court: You may proceed.

“Q. Would you explain what you mean? Did you actually go [183] down into the compartments?

“A. I went into every compartment except No. 1 lower hold.

“Q. Did you go into all of them?

“A. I went into all except No. 1 lower hold.

“Q. And why didn't you go into No. 1 lower hold?

“A. The hatches, all openings were covered with frames for that hatch, for that lower hold.

“Q. Did you detect any smoke or other sign of fire in No. 1 hold?

“Mr. Detels: I must object at this time to any question using the term ‘fire’ directed to this witness, on the basis that there has been no testimony establishing any qualification on his part to determine whether or not there was a fire; and also on

(Deposition of Rodney Palmer.)

the basis that this question which is now being propounded is a leading question."

Mr. Crutcher: Do you repeat the objection now?

Mr. Detels: I repeat the objection at this time, your Honor.

The Court: What is your statement in response?

Mr. Crutcher: Your Honor, I believe that the terms "smoke" and "fire" are terms referring to common everyday phenomena and that certainly you don't have to be an expert in order to know whether you have determined some sign of smoke or fire. I take the position and I [184] believe this Court can take judicial notice of the fact that fire is a phenomenon of nature which is known to every man, woman and child on the earth, and that every individual is capable of recognizing a sign of a possible fire. He may misconstrue it, but at least he's entitled to—I shouldn't say he's entitled to. He would inevitably recognize it if he saw it or smelled it or heard it.

The Court: That is sufficient. Have you found any authority for your position, Mr. Detels? Is there some authority you feel controls this Court's action on this question?

Mr. Detels: Your Honor, I do not have a case in point.

The Court: Unfortunately in this instance as in almost all others without exception the Trial Court does not get the value of many times needed authorities, but that is reserved for the appellate courts usually, so we will pass it to the appellate

(Deposition of Rodney Palmer.)

court and let them have the benefit of it, but I will say in making that passing that it seems to me uncontrovertible that every human being of adult age has a conception of what fire is, and the amount of it or the adequacy of it or whether or not it is a scientific view or just a common everyday sort of homemade view is something that can be gotten at [185] by cross-examination, and the fact, if it should be developed as a fact, of varying degrees of understanding of the concept of fire in different people seems to me to go to the weight of the testimony of the witness in question rather than to the admissibility of the evidence, and so the objection is overruled.

Mr. Crutcher: I will go down then to the answer which is on Line 24.

The Court: You may proceed.

"A. No, I didn't.

"Q. Were any precautions thereafter taken with reference to this indication of smoke?

"A. We maintained a frequent inspection upon the smoke detecting system. [186]

\* \* \*

"Q. Where did the vessel go on leaving Vancouver, B. C.?

"A. It went to Fisher's Mill at Seattle.

"Q. When did it arrive at Fisher's Mill?

"A. 7:00 o'clock in the morning on August 21st, Sunday.

"Q. Incidentally, what was the weather on the voyage from Vancouver or during the time you were

(Deposition of Rodney Palmer.)

at Vancouver and en route from Vancouver to Seattle?      A. It was good; light airs.

“Q. Now, at the Fisher’s Dock, what did you do? That is, what was being done aboard the vessel?

“A. We still maintained a watch on the smoke detecting system; made further examinations of the vessel and detected smoke coming from the exhaust on No. 1 king post.

“Q. And at about what time was that smoke detected?

“A. May I refresh my memory with the log book?

“Q. Certainly.

“A. (Referring to log book): At nine o’clock in the morning.

“Q. Going back for a moment to the previous day, August 20, in addition to the cargo compartments, did you also enter the forward deck house, or the No. 1 resistor house?      A. Yes, I did.

“Q. Did you examine the light switch [187] panel?      A. Yes, I did.

“Q. Did you find any switches turned on?

“A. The switches to No. 1 hatch were on.

“Q. Well, specifically, the lights in No. 1 hold?

“A. Yes, they were.

“Q. Is there a separate switch for the No. 1 lower hold?      A. Yes.

“Q. And one for the No. 1 lower ’tween deck?

“A. Yes.

“Q. And one for the No. 1 upper ’tween deck?

“A. Yes.

(Deposition of Rodney Palmer.)

"Q. Were all of those switches on at that time?

"A. They were.

"Q. Did you look to see whether the fuses were in place? A. I did at that time, yes.

"Q. And what did you find?

"A. I found that they had been replaced.

"Q. Now, which fuses are those?

"A. The No. 1 upper 'tween deck, lower 'tween deck and lower hold.

"Q. Were there separate fuses for each of those circuits? A. There were.

"Q. What type of fuses are those?

"A. Regular cylinder type clip fuses.

"Q. How many for each switch? [188]

"A. Two for each switch.

"Mr. Crutcher: May we have these marked for identification?

"(Whereupon, four photographs produced by counsel were marked for identification as Respondent's Exhibits C, D, E, and F, respectively.)"

\* \* \*

The Court: Then let the record show that [189] the "F" referred to at this place in this deposition on Page 26 is now in evidence as Libelant's Exhibit 1.

\* \* \*

(Three photographs were marked Respondent's Exhibits Nos. A-6, A-7 and A-8, respectively, for identification.)

The Court: What was formerly referred to in



(Deposition of Rodney Palmer.)

this deposition as Respondent's Exhibit E is now admitted in evidence as Respondent's Exhibit A-6. What has been marked by the clerk as A-6 has previously been referred to as the letter E in this deposition. It is now received in evidence.

(Respondent's Exhibit No. A-6 for identification was admitted in evidence.)

The Court: Likewise what formerly was referred to as Exhibit D is now referred to as A-8 and is now received in evidence. [190]

(Respondent's Exhibit No. A-8 for identification was admitted in evidence.)

\* \* \*

Mr. Crutcher: Then "C" should probably be A-7.

\* \* \*

(Respondent's Exhibit No. A-7 for identification was admitted in evidence.)

\* \* \*

"Q. Showing you a picture of a doorway, I will ask you whether this fairly represents the doorway to No. 1 resistor house as it was at the time of this accident?

"(Handing to witness.)

"A. Yes.

"(Reporter's Note: Above answer refers to Respondent's Exhibit 'C.') [191]

"Q. Showing you a photograph which has been marked as Respondent's Exhibit 'D,' would you

(Deposition of Rodney Palmer.)

state whether this represents the appearance of the outside of the switch panel as of this time to which we are referring? (Handing to witness.)

"A. Yes, it does.

"Mr. Detels: May I inquire, counsel?

"Mr. Crutcher: Certainly.

"Mr. Detels: In your answer, are you including the writing which appears to be in chalk on the face of the panel, or are you referring merely to the physical or structural details?

"The Witness: Referring to the physical structural details.

"Mr. Crutcher: May it be understood that the writing which appears on this should be disregarded?

"Q. (By Mr. Crutcher): Next, Mr. Palmer, referring to what has been marked for identification as Respondent's Exhibit 'E,' a photograph which appears to show switches, would you state whether or not that fairly represents the nature of the switch panel to which we are referring, again disregarding the painted markings on the panel?

"A. It does.

"Q. Last, I will ask you to refer to a photograph marked Respondent's Exhibit 'F,' (Handing to witness ). [192]

"I will ask you whether the fuse plugs which appear running up and down on either side of the switch panel reflect the nature of the fuse panel to which you have referred previously? (Handing to witness.)

A. It does.

(Deposition of Rodney Palmer.)

“Mr. Detels: Is it understood, again, Counsel, that the markings are to be disregarded and that the witness is not testifying to the presence or absence of fuses in any of the receptacles?”

“Mr. Crutcher: That is correct.

“Mr. Detels: That’s fine.

“Q. (By Mr. Crutcher): Now, Mr. Palmer, is there a legend on the inside door of this fuse box to show which switches control which lights?”

“A. There is.

“Q. Where is that legend?”

“A. It is typed on a sheet of paper placed against the door.

“Q. Does a part of that piece of paper appear in the right-hand margin of the photograph marked for identification as Respondent’s Exhibit ‘E’?”

“A. Yes, that is it.

“Q. Would you state briefly what the legend shows?”

“A. Which switches control which area.” [193]

\* \* \*

“Q. Did you personally observe the smoke which was coming from the king post? A. I did.

“Q. Will you describe it as to color and density?”

“A. I would say it was greyish smoke of a light to moderate density.

“Q. Now, what was done aboard the ship when this smoke was observed?”

“A. We notified company officials.

“Q. At Pier 88?”

(Deposition of Rodney Palmer.)

“A. Well, being Sunday, they were home. They were company officials from Pier 88.

“Q. Were any further steps taken aboard ship as far as precautions against fire were concerned?

“A. Made another inspection aboard ship and tried to locate it definitely, where the smoke was coming from.

“Q. How many compartments exhaust into the No. 1 or forward king post on the Oregon Mail?

“A. Just the one, No. 1 hatch.

“Q. All three of those compartments? [194]

“A. Yes.

“Q. Did you again make an examination of the No. 1 hold?

“A. Of the upper and lower 'tween decks.

“Q. Did you find any evidence of fire in those compartments?      A. No.”

\* \* \*

“Q. Was there any smoke in the No. 1 hold?

“A. No.

“Q. Was there any way in which you could feel the deck above the No. 1 hold?

“A. No, there wasn't.

“Q. Was there any way in which you could feel it from the No. 2 hold?      A. No, there wasn't.

“Q. Why was that?

“A. The deep tanks of No. 2 hold are adjacent to No. 1 lower hold. They were bunker tanks, for ship's bunkers.

“Q. Now, were there any steps taken during this

(Deposition of Rodney Palmer.)

day in an attempt to suppress fire in the No. 1 [195] hold?"

\* \* \*

"A. No, not on that day.

"Q. Did the smoke continue to come from the exhaust? A. It did.

"Q. Did the smoke increase in density?

"A. Well, from all appearances, it seemed to increase slightly.

"Q. What precautions were taken on the night of the 21st?

"A. All the smoke detector's unit was directed to No. 1 hold and covered through the wheelhouse and a watch was maintained on that.

"Q. What officials called on board ship during that day, do you recall?

"A. Company officials and Mr. Gow and Mr. Skewes. Alexander Gow.

"Q. Now, were there any events which changed the situation on the night of the 21st or in the early morning of the 22nd? A. No.

"Q. Did they stop working the cargo?

"A. No.

"Q. On the 22nd, what was done concerning the condition in [196] No. 1 lower hold?

"A. May I refresh my memory?

"Q. Certainly.

"A. (Referring to log book): On August 22d at 8:30 in the morning, Mr. Gow's representatives came aboard and checked the smoked detector. Then at



(Deposition of Rodney Palmer.)

9:00 o'clock that morning Mr. Gow came aboard, Captain Brady, Captain Swanson and the Master, and they all observed the concentration of air that was being brought up from No. 1 hold.

"Q. May I stop you there a moment, Mr. Palmer? Could you identify those various individuals, please? Mr. Gow is a marine surveyor, is he not?

"A. A marine surveyor from the Alexander Gow Company.

"Q. And Captain Brady?

"A. Captain Brady is a marine surveyor from National Cargo Bureau. Captain Swanson was operating manager from A.M.L.; Captain Greenwood was Port Captain for American Mail Line and the Master of the vessel was R. C. Wilmarth."

Mr. Crutcher: May it be stipulated, your Honor, that "A.M.L." as used there are the initials for the American Mail Line?

The Court: Is it so understood?

Mr. Detels: That's agreed. [197]

"Q. Thank you. Now, would you continue to describe the events during that morning?

"A. There was a concentration of air and what appeared to be smoke coming up this area. All other areas were again tried separately and there was no sign of any other disturbance coming from these areas.

"Q. Now, by 'this area' which you have just referred to, you are referring to No. 1 lower hold?

"A. Yes.

"Q. And you are talking about the concentra-

(Deposition of Rodney Palmer.)

tions of air in the smoke detector system, is that correct?      A. Yes.

“Q. Now, will you proceed to describe the events during that day?

“A. It was then decided at that time, with the above-named officials, that they commenced to discharge the lumber in No. 1 lower 'tween deck so that the grain cargo in No. 1 lower hold could be observed.

“Q. Was that work started that morning?

“A. That it was.

“Q. And under whose supervision?

“A. It was under my supervision.

“Q. I might ask generally, are you the officer in charge as far as cargo on the ship is concerned?

“A. Yes.” [198]

\* \* \*

“Q. Well, anyway, as of the early evening of August 25th, the longshoremen were actually down there in the hold removing additional barley, is that correct?      A. Yes.

“Q. What was the purpose of that operation?

“A. To get a clear and unobstructed view underneath the hatch coaming of the full area of the barley, to see the condition of it and to make sure there was no further damage going on.

“Q. At this time, was there any smoke issuing from the barley?      A. No, there wasn't.

“Q. Was there any further crackling noise from the barley?

“A. No. After 7:00 p.m. on the evening of the

(Deposition of Rodney Palmer.)

25th, no further evidence of any smoldering or smoking or crackling noises from the hatch.

“Q. Were you down in the hold at any time when you could observe the approximate area of the charring and burning in the after end of No. 1 lower hold? Did you understand my question?

“A. No. [199]

“Q. I will rephrase it. At any time during this late afternoon or early evening were you in the No. 1 lower hold?

“A. Oh, yes. After 6:00 o'clock I went down with the sailors and then again during the evening and made quite a few trips down.

“Q. Were you able to determine the approximate area in which this smoldering had taken place?

“A. After nine o'clock in the evening, the same evening, the 25th, enough grain had been removed from all sections of the hatch so as to get a clear and unobstructed view of the total area. It was found then to be confined to just the one particular area.

“Q. Well, now, I will ask if you can describe that area. First of all, where was it with reference to the hatch?

“A. Close to the center line on the port side aft.

“Q. And about how far aft of the hatch coaming did it run?

“A. It ran back approximately—I would say four to five feet.

“Q. How far to the port side of the center line?

(Deposition of Rodney Palmer.)

“A. As far as I could see, it run about—I would say approximately 40 feet.

“Q. Now, how deep did that burning go, or could you tell?

“A. It would be hard to tell. The way the grain was stowed in there at an angle and filled up, part of it had sloughed [200] off into the hatch.

“I would venture a guess and would say it would be down about three feet, I believe I would say.

“Q. Now, was this what we would call a burned area in the vicinity of one of the cargo lights?

“A. Yes, it was.

“Q. And which light would that be?

“A. It would be the light at the after end of the No. 1 lower hold, near the center line trunk there.

“Q. Is there only one light in that area?

“A. Yes, there was only one there.

“Q. Where was that light with reference to the burned area, that is, was it in the center or to one side of it or above it?

“A. It was above it and approximately in the center.

“Q. Were there any particles of grain adhering to the light itself at the time you observed it?

“A. Yes, there were.

“Q. What was the condition of the light when you saw it, will you describe that?

“A. It was black and smoke-charred.

“Q. Was it broken?

“A. It don't believe it was.

(Deposition of Rodney Palmer.)

“Q. What was the condition of the cable that led to the light?

“A. It was black and charred, and apparently burned through [201] or perforated.

“Q. Was any of the insulation gone?

“A. I believe it was mostly the outside covering that was destroyed.

“Q. That would be called the cable covering?

“A. Yes.

“Q. Now, you mentioned a slope in the surface of the grain. At the time the grain was loaded and before these events, was there an air space aft of the hatch coaming and between the hatch coaming and the after bulkhead of No. 1 lower hold?

“A. Yes, there would be an air space.”

\* \* \*

“Q. And how does that come about? Why doesn't the barley come up to the very top of the No. 1 hold?

“A. Well, the hatch coaming obstructed it when it was being loaded. Then it is the nature of the cargo that it settles to the after bulkhead, filtered itself through the limber holes in the hatch coaming.

“Q. Yes?

“A. And if there is cargo up above it it will continue in its natural form.

“Q. And about how deep is the air space after it settled, would you judge? [202]

I should say, after the barley settles.



(Deposition of Rodney Palmer.)

"A. Against the after bulkhead I would say approximately maybe four feet. It tapers up to the coaming at an angle where the barley filtered through the limber holes."

\* \* \*

"Q. Did you make any investigation to determine who had put the fuses back in the No. 1 lower hold switch box?

"A. I contacted the electricians.

"Q. Well, you can answer that yes or no.

"A. Yes.

"Q. Did you determine who put them back in?

"A. Yes, I did.

"Q. Who was it?"

Mr. Detels (Reading): "I object to this question unless it is limited to knowledge within the personal knowledge of this witness and not based upon statements made to him by third persons." And I renew the objection at this time, your Honor.

The Court: There is not anything to——

Mr. Crutcher: May it please the Court——

The Court: I think that made it incumbent upon the interrogating Counsel to establish under what circumstances he obtained this information.

Mr. Crutcher: Your Honor, I believe that is [203] correct, and I have asked some foundation questions which——

The Court: But you told him, "You may answer," and the answer is the fact which Counsel objecting does not wish in the record unless it be upon the proper conditions.

(Deposition of Rodney Palmer.)

Mr. Crutcher: May I offer the foundation questions which appear on the subsequent page, Page 55, at this time?

The Court: You may.

Mr. Crutcher: Question, commencing at Line 2 on Page 55.

"Q. Under whose supervision is the handling of the light switches for deck and cargo space?

"A. The mates on watch.

"Q. And to whom are the mates on watch responsible? "A. To the Chief Mate.

"Q. Was this investigation performed in the line of your duties as Chief Mate?

"A. It was."

Mr. Crutcher: That is the foundation that I have, your Honor, for offering this statement as to the result of his investigation.

The Court: That does not necessarily establish that anybody had a duty to him to report to him, and you [204] do not cite any authority to me at this time as to why this gets by the hearsay rule. [205]

\* \* \*

The Court: You may cross-examine.

\* \* \*

Mr. Detels: Yes, your Honor. Beginning with Page 69, Line 20.

(Deposition of Rodney Palmer.)

Cross-Examination

“Q. At the time you made your inspection of the No. 1 lower hold at Vancouver, had the shifting boards been put in place? “A. Yes, they had.

“Q. What is the height of No. 1 lower hold from the tank top to the ceiling?

“A. Without reference to anything, I believe it is 17 to 18 [206] feet.

“Q. The inspection which you testified you made of the wiring in the hold, that would include the wiring of the fixed cargo lights that you referred to? “A. Yes.

“Q. Was that a visual inspection from where you were on the tank top? “A. Yes, it was.

“Q. So far as you know, was any other inspection made of the wiring in that hold on this voyage, prior to loading barley? “A. No.”

\* \* \*

“Q. How long were you in the hold at that time? “A. Oh, approximately 15 minutes.”

\* \* \*

“Q. Now, does the night order book which you referred to contain any instructions with respect to cargo lights?

“A. They have to be turned on at sunset and turned off at sunrise and to turn them on when you have the longshoremen working.

“Q. Incidentally, how old are you, Mr. Palmer?

“A. 34.” [207]

(Deposition of Rodney Palmer.)

\* \* \*

"Q. Did you personally remove the fuses pertaining to the No. 1 hatch, or did you instruct someone to do that?

"A. I instructed someone to do that.

"Q. And who was that? Whom did you instruct to do that? "A. The mate on watch.

"Q. Did you ever check to see whether that had been done?

"A. I personally didn't check, but the mate on watch did and they reported to me it had been done."

\* \* \*

"Q. Well, of your personal knowledge, you don't know whether the fuses were removed or not from those pertaining to the circuits to No. 1 lower hold?

"A. I didn't personally observe them."

\* \* \*

"Q. Mr. Palmer, showing you what has been marked as Respondent's Exhibit 'E' for identification, and directing your attention to the paint marks which appear on the surface of the panel, can you state whether or not those marks were there on August 17, 1955? "A. No.

"Q. Were there any paint marks there at that time?

"A. I believe the only paint marks were on the ends of the [208] switches, that's all."

\* \* \*

"Q. This inspection which you made of the No.

(Deposition of Rodney Palmer.)

1 resistor house on the afternoon or evening of August 20—did you regard finding the switches on in the circuits controlling the cargo lights in the No. 1 hold as being significant?

“A. Well, I thought that it was unusual that they should be on.

“Q. Did you make any report at that time to anyone concerning the fact that the switches were on?

“A. Yes, I told the master that they had been on, that the [209] switches were on.

“Q. Did you tell him that evening?

“A. I told him as soon as I observed it.”

Mr. Detels: Proceeding now to Page 94, Line 18.

“Q. Now, was there any marking or writing upon the door of the panel which appears in Exhibit ‘D’ on August 18, 1955?

“A. There may have been, but I don’t remember it now.

“Q. You don’t recollect there was any writing on the door? “A. No.” [210]

\* \* \*

Mr. Crutcher: Your Honor, I have a short deposition which I think we could admit in here very quickly. [212]

\* \* \*

Mr. Crutcher: The same stipulation was made in this case as in the preceding case, or I should say in the preceding deposition. This deposition



was taken de bene esse. I'll start at Line 17 on Page 2.

DEPOSITION OF NORMAN G. McLEOD

"Q. Will you please state your full name?

"A. Norman G. McLeod.

"Q. What is your residence address?

"A. 10701 240th Place Southwest, Edmonds, Washington.

"Q. What is your occupation, Mr. McLeod?

"A. Merchant seaman.

"Q. How long have you been following the sea?

"A. Oh, about 15 or 16 years.

"Q. And how much of that time have you served as an electrician aboard ship?

"A. About 7 years.

"Q. Do you have to pass any tests or meet any particular requirements in order to classify as a marine electrician?

"A. Yes, I have a Marine Engineer's license.

"Q. Are you also licensed by the United States Coast Guard?

"A. Well, that is by the Coast Guard.

"Q. You are a member of a maritime union?

"A. Marine Firemen's Union. [213]

"Q. In 1955, did you serve aboard the SS Oregon Mail? "A. Yes.

"Q. What capacity were you aboard ship at that time? "A. Second electrician.

"Q. Particularly were you a member of the crew during Voyage 33, which was the voyage com-

(Deposition of Norman G. McLeod.)

mencing at Portland, Oregon, about August 13, 1955?

"A. I was on her in August, 1955. I don't recall the voyage number.

"Q. What was your capacity at that time?

"A. Second electrician.

"Q. Who was the first electrician?

"A. Clerman Jones.

"Q. Do you recall the occasion when the vessel was moored at Terminal 2 at Vancouver, Washington, on Wednesday, August 17, 1955, when they were loading barley into the number 1 and the number 5 holds?

"A. Well, I don't remember the exact date or anything like that, but I know what you are referring to.

"Q. Did you receive an order from one of the deck officers at that time concerning the fuses in the number 1 resistor house?

"A. Yes, from one of the mates. I don't remember which one.

"Q. What was that order?

"A. To pull the fuses for the lights in number 1 hold, all of [214] the lights.

"Q. And did you personally perform that duty?

"A. Yes, I did, I pulled them all.

"Q. Specifically did you pull the fuses to number 1 lower hold at that time?

"A. Well, I pulled them for number 1 lower, the 'tween deck and the upper hold—all three of them.

(Deposition of Norman G. McLeod.)

“Q. Do you recall at that time that the vessel was at Vancouver, Washington?

“A. Well, I don’t remember on that, just where it was docked then.

“Q. Mr. McLeod, I wish to show you a photograph, which photograph has been marked as Respondent’s Exhibit A.”

Mr. Crutcher: I should say apart from this deposition, your Honor, Counsel and I can agree on the identity of that photograph, I think.

(Counsel confer privately.)

Mr. Crutcher: Your Honor, it will be stipulated between Counsel that the photograph referred to in the McLeod deposition as Exhibit A is the same photograph which is already in evidence in this case as Respondent’s Exhibit A-6.

“Q. Mr. McLeod, I am asking you to assume that this is a photograph taken of a switch panel in the number 1 resistor house of the Oregon Mail. I will ask you whether [215] you can identify this as the switch panel to which you went when you pulled the fuses in the number 1 resistor house?

“A. That is the only one with a sliding panel, a sliding panel up there.

“Q. I show you some paint markings which appear on the panel and I will ask you if you are familiar with those paint marks?

“A. Yes, I am. I put them on there.”

\* \* \*

The Court: You may cross-examine. [216]

(Deposition of Norman G. McLeod.)

Mr. Detels: Yes, your Honor. Proceeding to Page 14, Line 20.

Cross-Examination

“Q. Again I will ask you whether you are able to testify positively that these markings that show on the panel which appears in the picture, Exhibit A, were made prior to this occasion at Vancouver?”

“A. No, I don’t know for sure whether they were made prior to it or not. I believe they were but I am not positive on it.

“Q. Would it aid your recollection in any way if you were to know that the Chief Officer had testified that to the best of his recollection they were not there at that time?”

“A. No, it wouldn’t change my mind in any way.

“Q. Did you personally trace out the switches to the individual lights at the time these markings were put on?”

“A. The Chief Electrician and I did on most of them.

“Q. Did you check—excuse me, did you finish?”

“A. (Continuing): It was the proposition of where one guy would have to stay up in the resistor house and flip off the switch and the other one would be down in the hold and yell back to him which lights went out.

“Q. Do you recall where the vessel was at the time? “A. No, I don’t.

“Q. Was it at sea or would that have been done while in port?”

(Deposition of Norman G. McLeod.)

“A. No, I would imagine it was at sea because we would be [217] more apt to do something like that at sea than we would in port.

“Q. Do you recall whether you checked the results that you got when you made this test against the index card that is on the back of the door?

“A. Like I say on that I believe the reason we checked it as close as we did was because we found some discrepancies in the index card on the door. That is why we made as thorough a check as we did, as to where they went, to be positive on it.

“Q. Did that test concern this particular panel?”

Mr. Crutcher: Your Honor, at this point I'll have to object to the cross-examination as extending quite far beyond anything that was contained in the direct examination of this witness.

The Court: What do you contend is the scope and substance and effect or the essence of the subject matter dealt with in the direct examination?

Mr. Crutcher: The direct examination, your Honor, we contend had simply to do with the fact that McLeod was the electrician or the second electrician at the commencement of Voyage 33 of the Oregon Mail; that he was told by one of the deck officers to turn off the fuse lights after the barley was loaded and that he did it; that he was able to identify the switch panel as [218] being one which has previously been shown here by a photograph, and that was all the testimony there was.

The Court: What have you to say?



(Deposition of Norman G. McLeod.)

Mr. Detels: The purpose of this cross-examination is to show that there were on the vessel improper or erroneous identifications of the switches in the distribution panels.

The Court: Is that the exhibit which has been referred to by the witness as "A," now in evidence as Respondent's Exhibit——

Mr. Detels: A-6.

The Court: A-6?

Mr. Crutcher: Yes, that is correct.

The Court: The objection is overruled.

Mr. Crutcher: Your Honor, I wish to point out now he's going into tests. We don't lose anything by this, but I think it's extraneous to this particular case. However, it's his business if he wants to——

The Court: The Court will have to—if anything about it is shown on that exhibit or in the words of the direct examination, the Court cannot restrict the examination in the manner stated. You may proceed. Try to be as brief as possible if there is some question about some of it being extraneous.

"Q. Did that test concern this particular panel? [219]

"A. I don't know whether it was on that particular panel. We found a couple of discrepancies throughout the panels. You have got, as I remember, you have got three different lighting panels for your five holds.

"Q. And there were discrepancies in the index cards?  
"A. Some of them."

(Deposition of Norman G. McLeod.)

\* \* \*

“Q. But you can’t recall which?

“A. No, I can’t recall which one.” [220]

\* \* \*

Mr. Crutcher: May it please the Court, this is a deposition de bene esse taken of the witness David L. Bennett under the same stipulation as was previously entered into between Counsel for the other depositions read today, and I start on Page 3 at Line 6.

# DEPOSITION OF DAVID L. BENNETT

“Q. Will you please state your full name?

“A. David L. Bennett.

“Q. And where do you live?

“A. Portland, Oregon.

“Q. What is your occupation?

“A. Marine surveyor.

“Q. Have you previously been in the merchant marine? “A. Yes, sir.

“Q. And for how long and what experience have you had briefly?

“A. Oh, approximately nineteen years’ service as seaman, officer and master.

“Q. And do you presently hold a master’s license? “A. Yes, I do.

“Q. Is that an unlimited license?

“A. Yes.

(Deposition of David L. Bennett.)

"Q. What trades have you served in generally?

"A. Mainly in the coastal trade and other trades, South America.

"Q. In the course of that trade, have you had occasion to [221] carry grain cargoes?

"A. Yes.

"Q. And how long have you been a marine surveyor?

"A. About ten years.

"Q. Are you presently practicing as a marine surveyor?

"A. Yes.

"Q. And were you so practicing during 1955?

"A. Yes.

"Q. Are you with the National Cargo Bureau?

"A. Yes.

"Q. Is that an organization of surveyors?

"A. Yes.

"Q. In that capacity, Captain, did you have occasion to go aboard the Oregon Mail in August of 1955 in connection with the loading of the cargo of barley in No. 1 hold and in No. 5 hold?

"A. Yes.

"Q. I was going to finish that—at the port of Vancouver, Washington?

"A. Yes.

"Q. And in the course of that examination or survey, did you have occasion to go into the No. 1 lower hold?

"A. Yes.

"Q. At this time do you recall that occasion or that inspection, I should say? [222]

"A. Well, I issued a certificate on that setup. If I could see that, perhaps I could recall. I actually

(Deposition of David L. Bennett.)

don't recall it right now because I see so many shipments.

"Mr. Crutcher: I will ask the reporter to mark this as Respondent's Exhibit A for identification."

The Court: Is it the same "A" as in the other depositions?

Mr. Crutcher: It refers to a certificate issued by the National Cargo Bureau, your Honor.

The Clerk: It will be marked Respondent's Exhibit A-9.

(A certificate of loading was marked Respondent's Exhibit No. A-9 for identification.)

The Court: Let the record show that this exhibit now marked Respondent's A-9 is the same as that referred to in this deposition of Mr. Bennett as Exhibit A. You may proceed.

"Q. Captain, I'm handing you a paper which is a photostatic copy of what purports to be a certificate of loading of National Cargo Bureau, Inc., which has been marked Respondent's Exhibit A for identification, and I will ask you to examine that and——

"A. Yes.

"Q. ——and state whether you can refresh your memory from that paper? [223]

"A. Well, yes. I think I can say I remember this ship and surveying it.

"Q. First of all, can you state whether this certificate relates to the survey which you made at the time you had mentioned? A." Yes, it does.

"Q. What date was that?

(Deposition of David L. Bennett.)

"A. It was August 5, 1955.

"Q. August what?

"A. Which day? You mean the date of this certificate?

"Q. The day of the survey, yes?

"A. Well, I just surveyed this ship from time to time for several days prior to August 19, 1955.

"Q. I see. In other words, this certificate covers more than the loading of the barley?

"A. Yes.

"Q. I see. Now, with the aid of that certificate, can you recall at this time whether you had occasion to enter the No. 1 lower hold of the Oregon Mail?

"A. Yes, I did.

"Q. At that time?

"A. Yes, I did.

"Q. And did you have occasion to examine the condition of the hold?

"A. Yes. [224]

"Q. And was that done in your professional capacity as a marine surveyor?

"A. Yes.

"Q. Did you form a conclusion as to the condition of the hold so far as its suitability for loading grain was concerned?

"A. Yes.

"Q. Would you state what that opinion is?

\* \* \*

"A. Well, I found that the hold was clean and dry and ready for the loading of a grain cargo. It was properly fitted in accordance with the rules of the National Cargo Bureau and the Coast Guard for carrying grain.

"Q. Did a part of your examination include a look at the overhead of that hold? [225]



(Deposition of David L. Bennett.)

"A. In a general sort of way, yes.

"Q. Would you have occasion to make a notation if you had found anything out of order?

"A. Well, I would require that it be corrected.

"Q. And would that be part of your function as a marine surveyor? "A. Yes."

\* \* \*

Mr. Detels: The cross-examination beginning at Page 7, Line 20.

### Cross-Examination

"Q. Captain Bennett, at whose request did you make any survey that you testified to?

"A. The American Mail Line.

"Q. And your report was made to them?

"A. Yes.

"Q. And they paid you?

"A. They don't pay me directly. They pay my firm."

Mr. Detels: Now, proceeding to Page 9, Line 17.

"Q. When you stated that you looked at the overhead in a general sort of way, you mean from a deck or tank top at the floor of the hold?

"A. Yes.

"Q. Did you make any particular observation of the cargo [226] light?

"A. Not a particular observation, no.

"Q. Or the wiring leading to the cargo lights? Well, if the wiring or lights had been defective, you wouldn't have been able to determine it from your

(Deposition of David L. Bennett.)

position, would you? "A. Very likely not.

"Q. Do you recall whether or not the cargo lights were on when you were in the No. 1 lower hold?

"A. I don't think so. I don't think they were. I don't recall whether they were on or not. I rather doubt it."

\* \* \*

"Q. Well, then, would it be fair to say that the purpose of your survey and the fact that your certificate so far as the No. 1 lower hold is concerned relates to the cleanliness of the hold, the fact that it was dry, and that it was suitable to receive cargo in those respects?

"A. Yes, and also that the recommendations of the National Cargo Bureau in relation to carrying grain are complied with.

"Q. By that you have reference to shifting boards? [227]

"A. Shifting boards and so forth.

"Q. Anything else besides shifting boards?

"A. Feeders, and that's about the main points."

The Court: If Counsel can agree upon it I would like them to state what their agreed definition of "feeders" is.

Mr. Detels: I don't want to pose as an expert witness. I am under the impression that it is a wooden structure placed in the hold in connection with the carriage of grain to prevent movement of the grain during the motion of the ship.

The Court: Is there any objection to that?

(Deposition of David L. Bennett.)

Mr. Crutcher: No, your Honor, that is correct. [228]

\* \* \*

JAMES C. GOW

called as a witness in behalf of respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Crutcher:

Q. Will you please state your full name?

A. James C. Gow.

Q. Where do you live, Mr. Gow?

A. Seattle.

Q. What is your occupation?

A. Marine surveyor.

Q. With what firm are you associated?

A. Alexander Gow, Incorporated.

Q. How long have you been a marine surveyor, Mr. Gow?

A. Thirty-six years.

Q. I'm sorry, I didn't hear you.

A. Thirty-six years.

Q. And how much of that time have you been in practice with Alexander Gow, Incorporated? [233]

A. During that period.

Q. Has that been here in Seattle?

A. Yes, sir.

Q. What generally is the type of your practice as a marine surveyor?

A. Hull, engine and cargo surveyors.

(Testimony of James C. Gow.)

Q. Do you yourself have a specialty within that field? A. Yes, sir.

Q. What is that specialty? A. Cargo.

Q. Now, Mr. Gow, during the course of your experience as a marine surveyor have you had occasion to deal with fire damage aboard ship?

A. Yes.

Q. Including fire damage to cargo?

A. Yes, sir.

Q. About how many such cases have you had, if you can recall?

A. I would say twenty-five, thirty cases.

Q. Are you familiar with the appearance and effect of fire so far as it relates to the holds of steel cargo vessels? A. Yes, sir.

Q. Mr. Gow, in 1955 were you called upon to attend the SS Oregon Mail in the month of August of that year in connection with a suspected fire in the number one lower hold? [234]

A. Yes, sir.

Q. And do you recall what day you first went to the vessel? A. Yes, the 21st of August.

Q. Who called you?

A. Captain Greenwood, port captain of the American Mail Line.

Q. And did you actually go aboard the ship on that occasion? A. Yes, sir.

Q. Where was it then moored?

A. The Fisher Flouring Mills.

Q. And did you make personal observations of the conditions aboard ship on that day?

(Testimony of James C. Gow.)

A. Yes, sir.

Q. Would you tell the Court briefly what you observed?

A. Captain Greenwood and the master of the vessel reported that there was a foreign odor in the pilothouse, and so we went into the pilothouse and noted the conditions, and it was our opinion that the odor was stronger in the area, the location of the smoke detecting system.

Q. Now, when you say "we," Mr. Gow, I want you to confine yourself to your personal observations at that time.

A. I see.

Q. Was that your personal observation?

A. Yes, that was my personal observation.

Q. Can you describe to the Court what that odor was like, [235] if possible?

A. It was an odor that we couldn't definitely determine. However, in our opinion it had smoke taint, but it was not at that time heavily pronounced.

Q. Were efforts made to trace the location of that odor while you were at the vessel on Sunday, the 21st?

A. Yes, sir.

Q. And just briefly what were those?

A. Well, the detecting cabinet in there takes air samples from all of the holds, and believing that it was coming from that—closer to that area, then we observed the flare tubes that are in the detecting cabinet to see whether or not we could detect smoke coming out of any flare from any hold.

Q. Well, was this an effort to determine the



(Testimony of James C. Gow.)

source of smoke from any of the compartments on the vessel?

A. It was an effort to determine whether or not our observance that we thought could be a smoke condition, or to determine where the taint was coming from or the odor that we had in the pilot-house.

Q. And what did you determine as a result of that inspection?

A. We determined that it was coming from the detection cabinet.

Q. Did you make any determination as to which hold of the vessel it was coming from? [236]

A. What was that again?

Q. I said did you make any determination as to which hold of the vessel it was coming from?

A. You couldn't—we couldn't tell from the particular flare at that time just exactly which one it was coming out of, although we felt it was—there was a slight indication it might be more pronounced from the number one hold, but it wasn't definitely determined.

Q. Incidentally, Mr. Gow, I neglected to ask you, in what capacity did you go aboard ship on that occasion?

A. As a surveyor for cargo, or to determine whether there was a fire or what condition was causing this odor in the pilothouse.

\* \* \*

The Court: Will you wait just a minute. I would

(Testimony of James C. Gow.)

like you to say again what you determined was the locale or the place where this odor was coming from, if you know, if you made such a determination.

A. It was coming from—we decided it was coming from an area close to the detecting cabinet, which is on the after bulkhead of the pilothouse.

The Court: Where is that detecting house? [237]

A. Pardon?

The Court: You said you determined it was in an area close to the detecting house. Where is the detecting house?

A. The detecting cabinet in the pilothouse, sir.

The Court: You may inquire.

Q. (By Mr. Crutcher): Mr. Gow, is that detecting cabinet what is sometimes referred to as a smoke detector unit?

A. Yes, sir.

\* \* \*

Q. (By Mr. Crutcher): Mr. Gow, I believe in a recent answer to a question you said you were a surveyor for cargo. Did you mean that you were retained by anyone other than American Mail Line?

A. No, sir.

Q. Then to put it more definitely, were you there on behalf of American Mail Line? [238]

A. Yes, sir.

Q. Were there other surveyors in attendance during his period?

A. Yes, sir. There was my assistant, Mr. Skewes, and Captain Johnson, I believe.

Q. Who is Captain Johnson?

(Testimony of James C. Gow.)

A. He was with the San Francisco Board, or he's with the National Cargo Bureau.

Q. Was Captain Brady also there?

A. Yes, Captain Brady was there.

Q. And who is Captain Brady?

A. He is with the National Cargo Bureau.

Q. Is Mr. Brady now deceased?

A. Yes, sir.

Q. Now, was there anything definite determined on Sunday as to——

The Court: What Sunday, what date?

Mr. Crutcher: Thank you, your Honor.

Q. (By Mr. Crutcher): I'm talking about the 21st of August, 1955. While the vessel was at Fisher's dock, Seattle, was there anything to indicate that there was a fire on board or anything similar?

A. No, it wasn't determined that there was a——

The Court: It is a question of what you determined. Did you find a fire on that ship on the [239] 21st of August, is what Counsel wants to know.

A. No, sir.

Q. (By Mr. Crutcher): Now, did you return to the vessel on August 22nd? A. Yes, sir.

Q. That was a Monday, was it not?

A. Yes, sir.

Q. The vessel had shifted to Pier 88?

A. Yes, sir.

Q. Now, would you tell the Court what the conditions were on the morning of Monday, August 22nd, when you went aboard the vessel at Pier 88?

(Testimony of James C. Gow.)

A. I had the officers of the vessel keep a close observance on the smoke detecting cabinet at all times, and on Monday I again examined the detecting cabinet to determine whether or not we could detect a more pronounced condition from any of the tube flares coming into the detecting cabinet.

Q. Now, what did you observe at the smoke detecting cabinet?

A. At the smoke detecting cabinet we detected a more pronounced condition. The air sample coming out of the hold, the number one hold, was darker or heavier than it was coming out of any of the other flares.

Q. Now, did you observe any smoke from the king post at that time? [240]

A. We didn't observe any—I didn't observe any smoke from the king post at that time.

Q. Now, did you make any further observations which would lead you to conclude that there was or was not a fire in the vessel on that day?

A. May I have that question again?

Q. Yes. I'm asking you whether or not on that day, Monday, the 22nd of August, you did or did not make some determination as to whether there was a fire condition in the Oregon Mail.

A. Yes, sir.

Q. And what did you do? I mean how did you arrive at this conclusion?

A. I had my assistant, Mr. Skewes, go up to the exhaust—the king post exhaust ventilator to see

(Testimony of James C. Gow.)

whether he could detect smoke coming from the exhaust, either by sense of smell or by sense of sight, and I continued to keep an observance myself on the cabinet to see whether there was any increase of smoke in the tube flare coming from the number one hold.

Q. Well, as a result of the observations that you made and that your assistant made on Monday morning, August 22nd, did you consult with American Mail Line officials? That is to say, the master of the vessel and Captain Greenwood in particular. [241]

A. I did.

Q. And as a result of that meeting was a decision reached as to what the condition was aboard the ship?

A. Yes. We were convinced at that time that we had fire in the number one lower hold.

Mr. Detels: I move to strike that answer as not responsive.

\* \* \*

The Court: The motion is denied.

Q. (By Mr. Crutcher): Now, Mr. Gow——

\* \* \*

The Court: Did you on the 22nd or on any other date ever find that there was a fire aboard the ship?

A. Yes, sir.

The Court: What date did you find it?

A. On the 22nd.

The Court: You may proceed.

Q. (By Mr. Crutcher): Mr. Gow, did you



(Testimony of James C. Gow.)

thereafter consult with the master and with Captain Greenwood, the port superintendent, and with the chief officer concerning the means to be taken with respect to this fire condition? A. Yes, sir.

Q. And were you present on the 23rd, the 24th and the 25th during the time that the cargo was discharged in the number one hold and during the time that the carbon dioxide was applied and during the time that the damaged barley was removed?

A. Yes, sir.

Q. Were you consulted in your professional capacity as a marine surveyor with respect to the steps which were taken at that time?

A. Yes, sir. [243]

Q. Now, would you explain to the Court why the carbon dioxide was applied as it was, if you know?

A. From the smoke particles from the—or the smoke samples and air samples from the number one lower hold, also from the noting of the conditions at the exhaust ventilator, we were thoroughly convinced that we had a fire in the lower hold, the number one lower hold, and the means of extinguishing that fire, the ship has a carbon dioxide system. It's normally called CO<sub>2</sub>. It's in a CO<sub>2</sub> room or carbon dioxide room that can be directed to any particular hold in the vessel.

Q. Now, why was the carbon dioxide used?

A. Carbon dioxide was used for the reason that it is an inert gas, it's a heavy gas, and it has a

(Testimony of James C. Gow.)

smothering effect on a fire, a very fine smothering effect on a fire.

Q. Now, Mr. Gow, why wasn't the carbon dioxide used until the morning of August the 24th?

A. The reason for that was that the fire was in the—we had determined that the fire was coming from—the smoke was coming from the lower hold, therefore we considered—I considered that the fire was in the number one lower hold. There was cargo in the 'tween deck, which didn't give you an opportunity for access to the number one lower hold. Therefore, that cargo had to be [244] removed. Carbon dioxide is a heavier-than-air gas and it shuts off the oxygen, and at a certain percentage it won't sustain fire, fire can't be sustained under it and even human life can't. It affects a person's breathing and you suffocate. For that reason you couldn't put longshoremen into the hold to take the cargo out of the 'tween deck with a possibility of the gas leaking, because when the gas comes from—when carbon dioxide is set off and the gas comes in, it comes in under a turbulence, there's a heavy pressure under it, and you could get gas up in the 'tween deck and it would be dangerous to put men in there, and you couldn't put men in there without a gas mask.

Q. In your opinion as a professional surveyor was it necessary to remove this cargo in the upper 'tween deck of the number one hold?

A. Very definitely.

Q. Mr. Gow, after this cargo had been reached,

(Testimony of James C. Gow.)

that is the barley in the lower hold, by means of the clams, did you go down into that area?

A. Yes, after it was declared gas free.

Q. Did you take samples of the char?

A. Yes, sir.

Q. And did you preserve those samples?

A. Yes, sir. [245]

Q. Were those samples later delivered to Laucks Testing Laboratories? A. Yes, sir.

Q. Was a portion of that sample delivered to the libelant in this case or the libelant's representative? A. Yes, sir.

\* \* \*

Q. (By Mr. Crutcher): Were you aware of the identity of the various surveyors who were in attendance at Pier 88 as well [246] as at Fisher's during the week of August 21, 1955?

A. Yes, sir.

Q. Was there a surveyor there representing the interests of the cargo underwriters?

A. Yes, sir.

Q. What was his name?

A. Captain Johnson.

Q. And who is he with?

A. He's with the National Cargo Bureau.

Q. Now, Mr. Gow, as the result of this accident and the work that was done during this week were certain expenses incurred for the purpose of salvaging damaged barley and for the purposes of extinguishing the fire? A. Yes, sir.

(Testimony of James C. Gow.)

Q. And are you familiar with those expenses?

A. Yes, sir.

Q. Do you have a memorandum before you which will enable you to tell the Court at this time what expenses were incurred? Now, the question is to be answered yes or no, Mr. Gow.

A. Yes.

Q. What is that memorandum?

A. What is what?

Q. I say what is that memorandum?

A. That's my survey report. [247]

Q. Is that a report which you prepared at the time of this accident or after this loss?

A. Yes, sir.

Q. Mr. Gow, in order to save time here I'm going to ask you if there is a statement of account in that survey report which states and sets out the various expenses which were incurred?

A. Yes, sir.

Q. Where is that account found in the memorandum?

A. That is found on the last two sheets of the report.

Q. Are you referring to a survey report numbered 13366 under the letterhead of Alexander Gow, Incorporated?

A. Yes, sir.

Q. And are you referring to a schedule which commences with the terms "Itemization of expense other than directly applicable to barley account fire"?

A. Yes.

Q. "In #1 hold." Would you describe to the Court what the various items of expense are with-

(Testimony of James C. Gow.)

out giving the details of expense? Simply explain to the Court what these items were.

A. Item by item?

Q. Well, in a general way describe them.

A. I see. Well, there was labor of the utility men covering cars of barley unloaded from the vessel, labor of [248] dock utility men rigging boards and laying tarp, labor of the dock utility men covering the——

\* \* \*

Q. (By Mr. Crutcher): Mr. Gow, I did not mean for you to read the individual items but to simply describe the nature of expenses which were incurred. You had railroad cars brought into Pier 88, did you not?

A. Yes, we had—I had railroad cars brought in to discharge the barley to the cars for holding and then to determine the condition of the barley for either its ability to be forwarded or to determine if it couldn't be forwarded, and——

Q. Now, what type of cars were those?

A. Those were gondola cars. [249]

Q. Are those steel cars? A. Yes.

Q. Which part of the barley which was discharged was put into those cars?

A. The burned barley was the only portion put in. It was our original—it was my original intention that we would put the barley all in cars, but there was a lack of cars, there was a shortage of cars, and therefore we had difficulty getting cars.



(Testimony of James C. Gow.)

Q. Would you describe to the Court about how much burned barley was discharged?

A. I'd have to look at my report here.

Q. Well, I just meant in terms of cars, Mr. Gow. How many railroad cars——

A. I think there were three cars. I'm taking that from memory, however.

Q. It might have been two? A. Pardon?

Q. I say it might have been two?

A. Yes, it might have been two.

Q. Now, there was other barley that was free of any taint, was there not?

A. No, the barley that we removed, we put the burned barley in the two cars, then the barley that was coming out had great possibility of smoke taint, therefore we [250] arranged to have the barley put—I arranged to have the barley put into trucks.

Q. Now let me—I think I can clarify this. The barley which was not heavily burned was put in trucks, is that correct? A. That's right.

Q. Where was that barley taken?

A. That was taken down to the state grain inspectors.

Q. And thereafter——

A. First of all for sampling by them to tell us whether or not this barley had smoke taint and what its grade would be.

Q. And then thereafter was that barley sold here?

A. Then that barley was transferred down to a storage warehouse and was subsequently sold.

(Testimony of James C. Gow.)

Q. Yes. Now, was that sold by you?

A. Yes, sir.

Q. And did you consult with the surveyor for cargo underwriters at the time of that sale?

A. Yes, definitely.

Q. Did you agree on the price? A. Yes.

Q. Now, what happened to the—well, I shouldn't put it in those terms. Would you describe the burned barley which was put in the gondola cars? [251]

A. Yes. That ranged from heavily charred and burned barley to barley that was brown in color from the action of fire or heat and also mixed with good barley, because when you would take the—to get the burned barley out, naturally you couldn't keep good barley from getting down into it, so you had portions of good barley and burned barley mixed together.

Q. There was some inevitable mixing, is that what you're saying?

A. There was no way of stopping it.

Q. Now, as a result of your survey did you make a computation as to the approximate amount of burned barley?

A. Yes, sir.

Q. Did you make a memorandum of that?

A. Yes. I have it in this survey report.

Q. Will you advise the Court of approximately the amount of burned barley taken from the vessel?

A. I'll have to take that from my report. [252]

(Testimony of James C. Gow.)

Q. (By Mr. Crutcher): Mr. Gow, I wonder if you would be agreeable to having your report marked as an exhibit? A. Yes, sir.

The Court: You may do so.

The Clerk: Respondent's Exhibit No. A-10.

(A survey report was marked Respondent's Exhibit No. A-10 for identification.)

\* \* \*

Q. (By Mr. Crutcher): Mr. Gow, I now ask you to refer to the report before you marked for identification as Respondent's Exhibit A-10, and I ask you to refer to the last pages of that report commencing with the fourth page from the end. [253]

\* \* \*

Q. (By Mr. Crutcher): Mr. Gow, I ask you to refer to the fourth page from the end which has the caption, "Interest No. 15—Page 2." Do you see that?

A. Yes.

Q. And I ask you to refer to that portion commencing with the paragraph which is the second paragraph up starting with the words "Surveyors jointly." Do you see that? A. Yes, I do.

Q. Now I ask you to refer to that remaining matter below that on that page, the matter on the next page, the matter on the next page and the matter on the final page, and I ask you, did you personally make this report? A. Yes, sir.

Q. At the time it was prepared did you know it

(Testimony of James C. Gow.)

to be an accurate compilation of the figures which are stated in this portion of the report?

A. Yes, sir.

Q. Was this report prepared in the regular course of your business as a marine surveyor?

A. Yes, sir.

Q. And is that a true and exact copy of the memorandum which was prepared at that time by you?

A. Yes, sir. [254]

\* \* \*

Q. Were those invoices submitted to you personally?

A. Yes, sir.

Q. And did you approve them for payment?

A. I did.

Q. Can you advise the Court whether the charges which were incurred in connection with this work were reasonable and necessary charges so far as the work done was concerned?

A. Yes, sir.

Q. Did this relate to the discharge of the barley and the other cargo in the number one hold of the Oregon Mail commencing August 21, 1955?

A. Yes.

\* \* \*

Q. (By Mr. Crutcher): Now, Mr. Gow, were the figures as shown in the invoices translated, or I should say transferred by you personally to this memorandum?

A. Yes, sir.

Q. Do you personally know that the figures are accurate?

A. Yes, sir. [257]

\* \* \*

(Testimony of James C. Gow.)

Mr. Crutcher: Yes, your Honor. I am offering the last four pages of Mr. Gow's report starting with the third paragraph from the bottom for the sole purpose of establishing the figures, the amounts of tenders and the amounts of expenses incurred in connection with this fire, or accident, as Mr. Detels no doubt prefers to call it, and I am asking this witness merely to testify that the figures shown here are accurate, that the expenses shown here were reasonably and necessarily incurred. So far as for whose account they are, I do not ask Mr. Detels to stipulate anything as to that.

The Court: Mr. Detels has stated his position in response to the offer, and those four pages, so much as is stated in the offer, are now admitted and [259] no more, and also the admission is for the limited purpose stated by counsel making the offer. It will not be considered for any other purpose.

(Respondent's Exhibit No. A-10 for identification was admitted in evidence.)

Q. (By Mr. Crutcher): Mr. Gow, there is one other matter which I had previously omitted to ask you which I would like to ask you before you leave the stand. Did you personally go down into the cargo hold, number one lower hold, after the damaged barley had been removed?

A. Yes, sir.

Q. And did you observe the general area in which the damaged or charred barley was located or had been located?

A. Yes, sir.



(Testimony of James C. Gow.)

Q. I might ask you, about when was that with reference to the time of discharge? Was there still damaged barley down there?

A. That would be on the date that we had removed the cargo from the 'tween deck and had taken sufficient barley out to get access to the lower hold.

Q. Well, now, did you personally go down in there while there was still damaged barley there?

A. Yes, sir.

Q. Could you describe to the Court the damaged area as you observed it when you went down there on that occasion? [260] And I'm referring now to the condition of the barley. Would you tell the Court what the condition of the barley was?

A. I found that when we had exposed the barley in the lower hold and had dug away sufficient barley to get back of the coaming in the port after corner, the barley was burned and it was charred and on the outer edges of it, it was discolored, but right aft of the corner of the coaming was the heaviest charred and burned condition.

\* \* \*

Q. (By Mr. Crutcher): Mr. Gow, I'm asking you now to describe the smoke condition on the 23rd of August. That is Tuesday. Was it different than it was on the 21st? [261]

A. Very much so. The smoke coming from the flare was very dense. It was definitely determined that that was a heavy smoke.

Q. Now, at the time that the barley was uncovered did you go down into the lower hold on more

(Testimony of James C. Gow.)

than one occasion?      A. Yes, sir.

Q. Would you tell the Court when you went down for the first time?

A. The first time that I went down was when the hold was declared gas free.

Q. What day was that?

A. That was on the 23rd—24th. It would be about the 24th, I believe.

Q. Was that after they had scooped the barley out?

A. Yes, after the barley had been taken out of the 'tween deck sufficient to allow access to the coaming, the lower edge of the coaming in the lower hold.

Q. Were you actually standing on barley in the lower hold on this first time that you went down there?      A. Yes, sir.

Q. Would you tell the Court what the condition was as you observed it at that time?

A. At that time it——

Q. Mr. Gow, let me ask you this question: Were you standing in the square of the hatch of the lower hold at that [262] time?

A. No, I was over in the corner, in the port corner of the hatch at that time.

Q. Which corner?

A. The port corner, the port after corner.

Q. Now, would you describe to the Court what you observed at that time?

A. In digging down——

(Testimony of James C. Gow.)

Q. I'm asking for your own personal observation at that time, Mr. Gow.

A. All right. When we had the barley dug down to where the coaming was exposed, because we wanted to get under the coaming to find out what the condition was, and at that time we could hear—I could hear a definite crackling, which indicated that a fire——

Q. Was this coming from behind the coaming?

A. It was coming from behind the coaming, yes, sir.

Q. Was any smoke coming from the barley at that time?

A. Very light smoke at that time.

Q. Now——

The Court: He started to say something and you interrupted him. What else was it you said you could hear?

A. I could hear a crackling sound like you would get from anything that was burning, like sticks and so forth burning, it gives off a crackling sound.

The Court: And what day was this, again? You have said it many times, but just—was this the first day you went aboard?

A. No, sir, this was towards the——

The Court: The first day was the 21st, the second was the 22nd, and what day was it?

A. I would say this was the 24th, taking it from recollection.

Q. (By Mr. Crutcher): Now, did you recommend that any action be taken at that time with

(Testimony of James C. Gow.)

respect to this condition? A. I did.

Q. Would you tell the Court what that was?

A. I recommended that a hand line—we speak of a hand line, that's a small hand line with a nozzle—be brought down and a spray—

The Court: You mean a fire fighting hose, is that what you mean?

A. Yes, sir. However, when we speak of a hand line, it's a small hose, not a large fire hose. And recommended that the area right behind the coaming be sprayed with water but not too heavy with water, but to get a cooling effect on the barley.

Q. (By Mr. Crutcher): And was that done?

A. Yes, sir.

Q. Who did that?

A. It was done by the officers of the vessel.

Q. About how long was that water applied to that area?

A. I would say the water was applied for probably about ten or fifteen minutes.

Q. Now, thereafter, Mr. Gow, was more barley removed?

A. Yes, then more barley was removed.

Q. Now, would you, again going back to this previous question, describe to the Court very briefly the damaged area as you observed it after barley had been removed sufficiently so that you could see back behind the coaming

A. When sufficient barley was removed to permit access to look under the coaming that extends down into the hold so that you could look aft of that, the

(Testimony of James C. Gow.)

burned barley was in the area of the corner of the hatch, the port after hatch coaming,

Q. Were you able to see how deep the fire had penetrated from the surface of the barley down?

A. I estimated it. I——

Q. I'm asking you, were you able to see?

A. No, I was not able to see how deep it went at that time.

Q. Were you able to see how far aft of the corner of the hatch coaming it had gone? [265]

A. I estimated it to——

Q. No, I'm asking you if you were able to see, Mr. Gow. Could you see then conditions which would enable you to know how far aft of the hatch coaming the fire area extended?

A. Yes, I could see an area.

The Court: See what?

A. I could see an area of burned barley.

Q. (By Mr. Crutcher): Now, how far back from the hatch coaming did that area extend, to the best of your recollection?

A. To the best of my recollection that would extend back about—I'd estimate it to be about five—about seven feet.

Q. Now, were you able to see conditions which would enable you to estimate how far towards the center line the fire area extended from the corner of the aft port corner of the hatch coaming?

A. Yes. It extended towards the center line with a charred condition to the center line, and then it was discolored barley from there on to a greater——



(Testimony of James C. Gow.)

Q. I'm now asking only about the actual charred area.

A. Yes, I would say that went practically to the center line.

Q. Now, how far away from those two dimensions aft did this [266] area extend? That is, I'm asking how far did it extend out into the barley in the trunk from the edge of the hatch coaming and from the edge of the main beam running aft at the port side?

A. Into the square of the hatch?

Q. Yes—not into the square, into the after trunk.

A. You're speaking of the—it was aft of the coaming, the lip of the coaming plate.

\* \* \*

Q. (By Mr. Crutcher): Mr. Gow, how far out into the barley did it go away from the main beam?

A. Aft?

Q. Yes. A. I would say about seven feet.

Q. And how far inboard or towards the center line from the main beam did it run, the main beam that you have previously mentioned?

A. I would say seven to ten feet.

Q. Were you able to see back in that area sufficiently to form a reasonably accurate estimate?

A. From what I was able to see, that was my opinion.

Q. Now, would you state to the Court whether there was any other charred area in the number one lower hold? [267]

(Testimony of James C. Gow.)

A. Yes, there was a charred area over on the starboard side in practically the same similar location to that of the port side, but to a very much lesser degree.

Q. Did you make any determination of the actual quantity of charred barley as distinguished from discolored barley that was removed from the ship after this accident?

A. No, sir.

Q. Can you make an estimate to the Court of the amount of damaged barley which was removed?

A. I did not make an estimate of it at the time because I was going to get the weight of the barley when it would come out and be put into the cars.

Q. Well, you perhaps misunderstood my question. I'm asking now after this—I don't mean when you were down in the hold, but afterwards. Did you have any means of judging the amount of charred barley that was taken out?

A. Yes, by placing it in railway cars and getting the weight of the railway cars.

Q. Well, there was some good barley and some smoke damaged barley in there as well, was there not?

A. Yes, sir.

Q. What percentage of that barley was actually burned in your judgment, or what part of it?

A. I would estimate it was about fifty per cent of it. [268]

Q. And what was the total weight of the barley removed at that time in railroad cars?

A. I'll have to take a look at the report. We

(Testimony of James C. Gow.)

estimated—I estimated the burned barley at 50,000 pounds.

Q. Now, Mr. Gow, as a result of your examination of that area, and incidentally how many times were you down in that area on that day?

A. I was continuously going in and out of it because I wanted to be able to separate the good barley from the bad barley.

Q. I'm asking now, did you have sufficient opportunity to observe the condition of the barley to form a conclusion as to whether it had been on fire?

A. Yes, sir.

Q. Would you tell the Court what your conclusion was?

A. The barley was very heavily charred and burned, and then portions of it would be brown, which was affected from the barley that had burned, and I wanted to be able to separate that.

Q. I appreciate that, Mr. Gow. I'm just asking you now to state to the Court whether in your opinion that barley was on fire.

A. Yes, sir. [269]

\* \* \*

The Court: When, as of what time does your opinion relate?

A. It would be on the 24th, your Honor, and at the time when we had exposed the barley to be able to draw the burned barley down into the square of the hatch where we could remove it.

Mr. Crutcher: One other question, your Honor.

Q. (By Mr. Crutcher): Mr. Gow, if the records

(Testimony of James C. Gow.)

showed that the carbon dioxide was applied on the 24th and that the barley was actually dug out on the 25th——

A. Well, that would be correct. It's been quite a while ago, but the actual dates in my mind was the 24th and the 25th, but it would probably be the 25th rather than the 24th.

\* \* \*

Cross-Examination

By Mr. Detels:

Q. Mr. Gow, you made reference to the fact that Captain Johnson of National Cargo Bureau was aboard the vessel on August 21st. Do you recall that testimony?      A. Yes, sir.

Q. Do you know in whose interest he was aboard the vessel [270] at that time?

A. It's my recollection or belief that he was representing the cargo underwriter's interests.

Q. Do you have knowledge of the fact that National Cargo Bureau is regularly retained by American Mail Line in connection with the loading of cargo aboard its vessels?

A. I'll have to ask you to ask that question again. I'm having a little trouble with my right ear this week.

The Court: It will be read, Mr. Gow. Read the question, Mr. Reporter.

(The reporter read the last question.)

A. Yes, sir.

(Testimony of James C. Gow.)

Q. (By Mr. Detels): You do have knowledge of that? A. Yes, sir.

Q. Do you know then whether he was there on the 21st in connection with the services that his company regularly performs for American Mail Line?

A. I can't recall definitely that he was there on the 21st.

Q. Now, you have made reference in your testimony, Mr. Gow, to the term "fire," and I would like to have you explain to me what meaning you give to that word.

A. My opinion on fire would be anything that is burned, that has been—a fire has started and it keeps burning and it will spread and it burns whatever it comes in contact with, whatever it comes in contact with it will [271] burn.

Q. Does that necessarily involve the presence of flame?

A. It could involve flame, it could involve a glowing condition.

Q. Well, does it necessarily involve one of those two conditions to which you testified?

A. Yes, I would say so.

Q. Now, did you at any time aboard this vessel observe either glow or flame? A. No, sir.

Q. And that would include the periods when you were aboard the vessel before the CO<sub>2</sub> was applied in the number one lower hold and would also include the times when you made inspections in the number one lower hold after a portion of



(Testimony of James C. Gow.)

the barley had been discharged? A. Yes, sir.

Q. Mr. Gow, do you know what effect a temperature sufficient to sustain glow or flame would have on a substance such as barley? A. No, sir.

Q. You do not? A. No, sir.

Q. Well, then how did you form your conclusion by inspecting this barley that a fire had occurred?

A. Due to its condition, and further to the fact that no [272] one could see the flame or no one could see a glowing mass because you couldn't see into the compartment, and when it was exposed to where you could get near it and you could hear a crackling sound, you knew that there was some action taking place. When we wetted that down by water we knew we had put out—if there was a glowing mass or even a flame, we knew that the application of the carbon dioxide would exclude the oxygen and that fire couldn't burn.

Q. Mr. Gow, in your direct testimony you testified that by your observation of this barley in the damaged condition you determined that in your opinion there had been a fire? A. Yes, sir.

Q. And you have now testified, as I understand you, that the term "fire" necessitates the presence of flame or at least glow?

A. I would think so.

Q. And you have also testified that you have no knowledge of the effect which a temperature necessary to sustain a glow or a flame would have on a substance such as barley?

(Testimony of James C. Gow.)

A. No, not on barley.

Q. Well, then how were you able to form any conclusion as to the existence or nonexistence of a fire by your [273] observation of the damaged barley?

A. It was my opinion that the condition of the barley showed a burned condition.

Q. But you do not know what effect a flame temperature or a glow temperature has on barley?

A. I have never submitted it to a test, no, sir.

Q. Well, do you know, Mr. Gow, that the temperatures necessary to sustain a flame or a glow would necessarily reduce some of the mineral components of the barley to ash?

A. I would suppose so, yes.

Q. Now, in your observation of the barley that you observed in the hold and what was removed from the hold in a damaged condition did you observe any ash?

A. I observed what would appear to be ash in the samples that I took, yes, sir.

Q. Do you recall, Mr. Gow, that your testimony was taken upon oral deposition on April 16th?

A. Yes, sir.

Q. Of this year. And do you recall that at that time I asked you whether you had observed any ash in any of the barley aboard this vessel?

A. Yes, sir. [274]

\* \* \*

Q. (By Mr. Detels): Page 41, Line 25. Do you find that, Mr. Gow?

A. Yes, sir.

(Testimony of James C. Gow.)

Q. ' And the question, "Did you observe any barley which was reduced to ash?"

A. My answer was, "No."

Q. Turning again to Page 44, Line 1, my question was, "Did you observe any ash?" And your answer was, "No, sir," was it not?

A. Yes, sir.

Q. Was that your recollection of your observation of the barley at that time?

A. Yes, sir, specifically asking if it was ash, I didn't analyze it at all. I saw particles of what could be, but I had no way of knowing that it was actual ash.

Q. Well, do you have any way of knowing now?

A. No, sir.

Q. Do you have any knowledge now which you did not have at the time your deposition was taken?

A. No, sir. [275]

Q. And at the time it was taken your testimony was that you had not observed any ash?

A. Specifically as the word "ash," yes.

Q. Is that your testimony at this time?

A. Yes, sir.

Q. You did not observe any ash in any of the barley?

A. That I could specifically state was ash by actual determination of it.

Q. Well, I'm asking you whether you observed any ash in the damaged barley aboard the Oregon Mail or any barley which was taken from the number one hold of the Oregon Mail on this occasion.

(Testimony of James C. Gow.)

A. My answer to that would be this, that what I saw around the barley was in my opinion ash, but I didn't test it to find out whether it was ash or not, but it would be my opinion that it would be ash.

Q. That was not your testimony when your deposition was taken, was it, Mr. Gow?

A. No, because at that time you asked me the question of whether I had seen actual ash, and I said no.

Q. Well, I will ask you the question again. Did you see actual ash?

A. No, I didn't see actual ash. [276]

\* \* \*

The Clerk: Libelant's Exhibit No. 2.

(A glass jar with contents was marked Libelant's Exhibit No. 2 for identification.)

Q. (By Mr. Detels): Mr. Gow, you have been handed what has been marked as Libelant's Exhibit 2, and I will ask you if you can state what that is?

A. This is barley from the Oregon Mail, a sample which I took from the burned area. [277]

\* \* \*

Q. Based upon the inspection which you have just made of Libelant's 2, do you observe any difference or any change in the appearance of the barley contained in the jar at this time from its appearance at the time you made the delivery to which you have testified?

(Testimony of James C. Gow.)

A. From my cursory look here it looks very much the same as the other.

Q. Now, the barley which you obtained from the Oregon Mail in August, 1955, and of which you delivered a sample to the libelant on April 22nd of this year was the most severely damaged barley which you were able to obtain, was it not?

A. I took it from—I brought up a whole bucket of it and I took this out of the bucket to put it into a milk carton to keep a representative sample of it. [280]

\* \* \*

Q. (By Mr. Detels): Well, the sample that you took was a sample of the most severely damaged barley which you observed aboard the vessel, was it not?

A. I would say it was a representative sample of the part that I brought up.

Q. Well, did you observe any barley aboard the vessel which was damaged more extensively than the barley which you preserved in this container?

A. No, I wouldn't say that the sample that I took—I would say it was representative.

Q. Well, that's not what I'm asking you, Mr. Gow. I want to know if there was any barley which you observed aboard the vessel which was in a more heavily charred or damaged condition than the sample which you preserved.

A. No.

\* \* \*

Q. Well, then the sample which you preserved



(Testimony of James C. Gow.)

was not representative of the entire quantity of barley, but it [282] was representative of that which was most severely damaged?

A. I would think so, yes.

Q. Now, you testified that you personally heard a crackling noise when you entered the hold on the afternoon of August 25th, is that correct?

A. Yes, sir.

Q. And can you state what caused that crackling noise?

A. All I can say is that the crackling sound would be the sound that I would expect would be coming from something that was burning or glowing, and having applied the carbon dioxide which would reduce it down, there still was sufficient heat and sufficient burning to necessitate something being done because the carbon dioxide was being diffused out of the hold and applying water on it was the only way to cool it down.

Q. Well, isn't it a fact that the cause of this crackling noise was the diffusion or dispersion of the CO<sub>2</sub> into the barley kernels?

A. No, I don't think so. That's my opinion.

Q. Your opinion is that it was not a diffusion of the CO<sub>2</sub>?

A. It was not a diffusion of the CO<sub>2</sub>, that's right. [283]

\* \* \*

The Court: That will be done.

(The exhibit was handed to the witness.)

(Testimony of James C. Gow.)

Q. (By Mr. Detels): Directing your attention to the last paragraph of Page 3 of your survey report, Mr. Gow, I will ask you to read the sentence appearing approximately seven lines from the bottom beginning with the words "Air filtering" or words to that effect.

A. (Reading): Air filtering thru and diffusing the CO<sub>2</sub> caused scorched and blackened grain to crackle." Do you want me to read further than that?

Q. No, that's sufficient. Was that your conclusion at that time as to the cause of this crackling?

A. No, it isn't, for this reason, that the CO<sub>2</sub> does have a cooling effect. It's not a heavily cooling effect, but it shuts off the oxygen to whatever is burning, and it settles over there and as it diffuses, then if oxygen gets to it, why that glowing mass will come right back up again either to a heavier glow or to an actual fire, but you have reduced the carbon dioxide which was holding that down to smother it.

Q. Well, does the sentence which you just read from your [284] report state your opinion as to the cause of the crackling which you heard in the hold?

A. I still—this—

Q. I'm asking for a yes or no answer, Mr. Gow.

A. Yes.

\* \* \*

The Court: The answer is yes. Proceed.

Q. (By Mr. Detels): Well, is it not a fact, Mr.

(Testimony of James C. Gow.)

Gow, that barley, like corn, will pop or crackle at temperatures in a range of 600 degrees?

A. That I cannot say. I'm not an expert on that.

Q. Well, then the fact that there was a noise in the nature of crackling, you're unable to state that that indicates that the barley had reached any specific temperature?

A. I can't say what the barley—that the barley reached any specific temperature because we had cooled the [285] barley down with the carbon dioxide. I don't know what the temperature was before the application of the carbon dioxide.

\* \* \*

Q. (By Mr. Detels): Do you know, Mr. Gow, what temperature the barley had reached at any time?

A. No, sir.

Q. And you have no knowledge of the temperature which will produce a crackling or a popping noise in barley?

A. No, sir.

Q. Now, going back to the morning of August 21st for a moment, how was your attention directed to this situation aboard the Oregon Mail?

A. By a foreign odor in the pilothouse.

Q. No, I'm referring to the question of how you happened to go aboard the vessel on that day.

A. Oh, I was requested by the American Mail Line to go aboard.

Q. Can you state as best you can recall what request was made to you?

A. Yes. I was requested to come down to the

(Testimony of James C. Gow.)

vessel as they were noting an odor in the pilothouse that couldn't be identified, and they called me in to go down there to [286] see if we could determine what was the cause of this foreign odor in the pilot-houses. [287]

\* \* \*

Q. Was the word "fire" mentioned in connection with this request to you?

A. No, no fire was mentioned.

Q. Didn't you understand that your services were being requested in connection with determining the possibility of a fire aboard the vessel?

A. Oh, yes, definitely.

Q. That was your understanding on August 21st?

A. Yes.

The Court: Does anybody have any serious contention that you whose views went into your conclusions about whether or not that was a fire and it was a fire on every day and every minute that that odor began to show?

A. Yes, sir, all we were getting was an odor from there that we couldn't—as I say, these samples come out of all the holes and you get odors and an intermingling of odors, but we were naturally——

The Court: Did you ever come to the conclusion [288] that it was a fire that was the subject of the inquiry?

A. Yes, we came to the conclusion.

The Court: When did you conclude that it was a fire?

A. On the 24th.

(Testimony of James C. Gow.)

The Court: Is it or is it not the fact as you now know the fact to be that it was at all times a fire from and after the 20th day of August, 1955?

A. Yes, sir.

The Court: You may inquire.

Q. (By Mr. Detels): At the time you went aboard the vessel on the morning of August 21st did you know that there was a cargo of barley in the number one lower hold?

A. Yes, because——

Q. And you isolated the odor as coming from that compartment, did you not? A. Yes, sir.

Q. And you knew that the odor was indicative that that cargo was heating, did you not?

A. It was indicative of a strong odor, but it was not definitely determined at that time as being smoke.

Q. Well, let me put it this way: The presence of odor is indicative of the fact that a substance is being heated, is it not?

A. Not necessarily, no. [289]

Q. Well, the odor that was present on the morning of the 21st then did not indicate heat to your mind?

A. It was a foreign odor that could come from interminglings of various cargo, air samples coming from various cargoes. It was my opinion or my feeling that it had a smoke odor to it, but there was nothing definite we could get from the flare to substantiate that. Therefore I had to consider that the air samples from the other holds might bring



(Testimony of James C. Gow.)

in odors from those holds from cargo that might be in there.

Q. Well, wasn't the smoke detector concentrated on the suction lines in the number one lower hold at that time?

A. No, at the time that I first saw it all of the sixteen or seventeen flares, air samples were being taken from all of those.

Q. Well, were you advised that a visual or physical inspection had been made of all spaces aboard the vessel?

A. Yes, sir.

Q. Except the number one lower hold?

A. Yes, sir.

Q. Was there any doubt in your mind on the morning of August 21st that this odor was coming from the number one lower hold?

A. Yes, there was a doubt, because we hadn't been able to [290] pin point it at that day, on the 21st we hadn't pin pointed it as to exactly where it was coming from.

Q. Well, were you aware of the fact that the smoke detector could be concentrated on the suction line from a single compartment?

A. Yes, sir.

Q. And that you could close the valves from all other compartments except the number one lower hold?

A. Yes, sir.

Q. And in that way determine whether or not the odor was coming from this one space that was impossible to inspect?

A. Yes, sir.

Q. Was that done?

A. Yes, sir.

Q. Did the odor persist?

(Testimony of James C. Gow.)

A. Yes, the odor persisted.

Q. Well, didn't that satisfy you that the odor was coming from the number one lower hold?

A. Yes, it did.

Q. And didn't you identify that odor as being caused by heating of the cargo?

A. Not at that time, no, sir.

Q. What conclusion did you reach as to the cause of that odor? [291]

A. We reached the conclusion, or I reached the conclusion that the air sampling from the number one hold was giving us the odor that we were getting in the cabinet, and we watched the cabinet very carefully to try and detect any presence of smoke, because the flare in the cabinet has lights and mirrors that accentuate any air samples coming up that will show smoke.

Q. On that day did you yourself make any inspection at the king post exhaust vent from the number one hold? A. I did not personally.

Q. Was any report made to you with reference to an inspection at that point? A. Yes, sir.

Q. Was that report that the odor was detected in the exhaust vent from the number one hold?

A. Yes, sir.

Q. Now, did this odor indicate to you, or did you have in mind any other possible cause of this odor other than heating of the barley in the number one lower hold?

A. No, I didn't have any other—

Q. Well, you knew it was being heated?

(Testimony of James C. Gow.)

A. No, I didn't know it was being heated, no.

Q. Well, can you suggest any other condition which might have caused that odor to come from the number one lower hold? [292]

A. No.

Q. Well, didn't you reach the conclusion at that time then that there was heating occurring in that cargo?

A. I reached the conclusion at that time that while I couldn't visually verify it, that it was smoke, that it in all probability was smoke.

Q. Resulting from heating of the cargo in the number one lower hold?

A. Yes, it could be from heating of the cargo.

Q. Did you question any of the ship's officers as to whether or not they had observed smoke prior to the morning of August 21st?

A. No, I do not believe so.

Q. From your experience as a marine surveyor, Mr. Gow, you have knowledge of the fact that heat damages grain cargo, do you not?

A. Yes.

Q. Was there any question in your mind on the morning of August 21st that this cargo of barley in the number one lower hold was then being damaged?

A. I definitely was of the opinion that there was some condition in the barley in the number one lower hold that was giving us a condition in the flare from the number one hold, but without any verification as to its being smoke, because we couldn't see it, it was [293] clear and there was no—the odor could have been smoke, but it could

(Testimony of James C. Gow.)

have been an intermingling of some other odors, but to definitely pinpoint it as smoke at that particular time, I wasn't positive it was smoke.

Q. And you made no inquiry among the ship's deck officers of any observations they might have made concerning smoke?

A. No, I did not, because it wasn't necessary in my opinion because I had been called down there to observe the cabinet, and if there had been smoke coming up prior to that, why they would have said so and they would have—I would have seen it myself because the smoke would still be coming.

Q. Did you inquire as to whether they had seen smoke?

A. I do not believe so, no.

Q. You didn't ask the master?

A. No, I didn't ask the master.

Q. Or the chief officer?

A. No, sir, as I recall now.

Q. Or the second officer?

A. No.

Q. Now, directing your attention again, Mr. Gow, to Libelant's Exhibit 2, at the time that you made a segregation of the sample of damaged barley which you had had in your possession since August, 1955, was a [294] similar quantity delivered to Laucks Laboratory?

\* \* \*

A. Yes, sir.

Q. (By Mr. Detels): And did Laucks Laboratory receive that sample on behalf of the respondent American Mail Line as far as you know?

(Testimony of James C. Gow.)

A. Yes, sir.

Q. And was the barley which you delivered into the custody of Laucks Laboratory representative of and similar to the barley which is contained in Libelant's Exhibit 2?

A. Yes, sir. [295]

\* \* \*

### Redirect Examination

By Mr. Crutcher:

Q. Mr. Gow, it was asked of you on cross-examination whether you had observed any glow or flame in connection with this fire in the number one lower hold. My question is, were you in a position to observe the fire at any time until the carbon dioxide had been put into the hold area?

A. No, sir. There was tons of barley in the 'tween deck and there was lumber over the barley and other cargo down there and there was no way of getting down there to make a visual examination.

Q. You also testified that in your experience you knew that heat damages grain. I ask you to observe the sample which is before you as Libelant's Exhibit 2 and state to the Court whether you have ever seen any similar damage to grain by heat alone in the absence of fire.

A. No. [296]

\* \* \*



(Testimony of James C. Gow.)

### Recross-Examination

By Mr. Detels:

Q. Have you ever observed, Mr. Gow, barley which you know to have been damaged by heat in the absence of flame or glow? A. No. [297]

\* \* \*

### MARSHALL MCGINITIE

called as a witness in behalf of respondent, being first duly sworn, was examined and testified as follows:

### Direct Examination

By Mr. Crutcher:

Q. Will you please state your full name?

A. Marshall McGinitie, M-a-r-s-h-a-l-l M-c-G-i-n-i-t-i-e.

Q. Where do you reside, Mr. McGinitie?

A. In Mount Vernon, Washington.

Q. What is your profession? A. Sir?

Q. I say what is your profession?

A. I am a marine engineer.

Q. And how long have you been a marine engineer?

A. Many years. I've been twenty-seven years in the same office.

Q. And was that practice here in Seattle?

A. Yes. McGinitie—

Q. In the course of your practice have you had occasion to conduct hull surveys aboard ships?

(Testimony of Marshall McGinitie.)

A. Many times. [298]

\* \* \*

Q. (By Mr. Crutcher): Mr. McGinitie, in 1955, were you called upon to attend aboard the SS Oregon Mail in connection with a suspected fire aboard that ship about August? A. Yes, sir.

Q. Did you attend aboard that ship in your capacity as a hull surveyor until such time as it was determined that any possible fire was extinguished? A. Yes, sir.

Q. In the course of your service there did you have occasion to call upon Mr. Williamson to take some photographs? A. I did.

Q. Will you tell the Court where those photographs were taken? Mr. McGinitie, possibly you didn't understand my question. I meant were they taken in the number one lower hold of the Oregon Mail? A. Yes, sir.

Q. Was that after they had discharged the damaged barley from that hold?

A. That was just after we had succeeded in getting to the damage, the fire. [299]

The Court: Was it before or after some was discharged?

A. After it was discharged, all the defective grain were out.

The Court: Did Counsel hear?

Mr. Crutcher: Yes, your Honor.

Q. (By Mr. Crutcher): Now, Mr. McGinitie, were you present at the time that those photographs were taken?

(Testimony of Marshall McGinitie.)

A. I directed where they were taken.

Q. And were you present at that time?

A. I was.

Mr. Crutcher: May I have the clerk mark some photographs, your Honor?

The Court: That will be done.

The Clerk: Respondent's Exhibit A-11, Respondent's Exhibit A-12, Respondent's Exhibit A-13, Respondent's Exhibit A-14.

(Four photographs were marked Respondent's Exhibits Nos. A-11, A-12, A-13 and A-14, respectively, for identification.) [300]

\* \* \*

### HARRY ALBERT GREENWOOD

called as a witness in behalf of respondent, being first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Crutcher:

Q. Will you please state your full name to the Court and spell your last name?

A. Harry Albert Geenwood, G-r-e-e-n-w-o-o-d.

Q. What is your residence, Captain?

A. 8932 Northeast 1st, Bellevue, Washington.

Q. What is your occupation?

A. Master mariner.

Q. What is your present position?

A. Superintendent of Operations for American Mail Line in Seattle.

(Testimony of Harry Albert Greenwood.)

Q. How long have you been a mariner?

A. I went to sea in 1933.

Q. And have you followed the sea or the maritime business continuously since that time?

A. Yes, sir.

Q. And when did you first receive your master's license?

A. I believe it was 1946.

Q. When did you come to work for American Mail Line?

A. In 1951, June of 1951.

Q. What position did you then have with the company? [306]

A. I came in as an assistant with the cargo superintendent.

Q. And thereafter did you become port superintendent?

A. Thereafter I became assistant port captain, later port captain, and ultimately superintendent of operations.

Q. What was your position in August of 1955?

A. Port captain.

Q. And were you here in Seattle?

A. I was here in Seattle, sir.

Q. Is this the headquarters of the company?

A. Yes, sir.

Q. And where is your office?

A. I am situated at Pier 88.

Q. Is that on the Seattle waterfront?

A. That is on the Seattle waterfront, at the foot of Galer Street.

\* \* \*

Q. (By Mr. Crutcher): In August of 1955, Captain, were you called to attend at the Oregon

(Testimony of Harry Albert Greenwood.)

Mail in connection with [307] a suspected fire in number one lower hold? A. Yes, I was, sir.

Q. Do you recall approximately what time that was with relation to when the vessel got into port?

A. Well, I believe she got in, it would be some-time prior to eight o'clock that morning, and it was shortly thereafter that I received this call.

Q. Do you recall if that was Sunday, August 21?

A. Yes, it was Sunday, August 21st.

Q. From whom did you receive the call?

A. I received that call to the best of my recollection from the master.

Q. Had you previously heard of this suspected fire? A. No, sir.

Q. Now, would you tell the Court what you did after receiving the telephone call from the captain of the vessel?

A. I told him that I would proceed down to the vessel immediately, which I did. I also called Mr. Gow. I do not recall whether I called him from my home or whether I called him when I got down there, but I did call Mr. Gow.

Q. And when you got down there did you consult with Mr. Gow?

A. I know Jack Skewes of the same firm as Mr. Gow, he was [308] there, and I believe Mr. Gow was also there.

The Court: Where was the vessel at that time when you first got aboard her?

A. I believe that was at Fisher's dock. That would be Pier 25, sir.



(Testimony of Harry Albert Greenwood.)

Q. (By Mr. Crutcher): Will you explain to the Court why you called Mr. Gow?

A. Well, the report that I got from the master was of this suspicious odor which he was very leery of. My immediate reaction was to get ahold of cargo surveyors that were experienced in giving me information and looking after our interests.

Q. And then he was called to attend for American Mail Line, is that right?

A. That's right, sir.

Q. And thereafter did you consult with the captain and with Mr. Gow aboard ship?

A. Yes, sir; we did.

Q. Now, did you attend the vessel at various days up to August the 26th? A. Yes.

Q. I should rephrase that question, Captain. It's not in proper form. Did you attend the vessel after this time to which you have referred on Sunday morning? A. Yes, sir. [309]

Q. Would you tell the Court what those occasions were, briefly?

A. After I left the vessel on the 21st, which was Sunday, I made no further appearance until Monday morning, when the vessel was at 88, and from that time until the vessel sailed I was aboard many, many times at various times of the day and night.

Q. Did you call upon anyone outside of American Mail Line for assistance other than Mr. Gow?

A. Mr. McGinitie was called in.

Q. And did you employ Mr. McGinitie as a surveyor also? A. For the hull, yes.

(Testimony of Harry Albert Greenwood.)

Q. Was he also in attendance?

A. Yes, sir.

Q. How long did he continue in attendance?

A. To the best of my knowledge until the cargo was all discharged.

Q. Did you personally confer with Mr. McGinitie during that period?

A. There were various periods when there were discussions held with Mr. McGinitie.

Q. What was the nature of those discussions?

A. Well, it was to determine what course of action or what our particular problem was there. I know numerous minds are better than just one, and so it was discussed that [310] way with Jim Gow, also the master and the chief mate.

Q. And were other officials of American Mail Line involved?

A. Yes.

Q. Who?

A. Captain Swanson was involved.

Q. What was his position?

A. He was at that time superintendent of operations.

Q. That's the position you now hold?

A. Yes, sir.

Q. Did you personally go down into the area from which the burned barley had been taken about August 25th or August 26th?

A. If those were the dates when the completion of discharge had been finalized, yes.

Q. How soon after they reached that area did you go down?

(Testimony of Harry Albert Greenwood.)

A. I think it was almost immediately after the discharging had been completed.

Q. Did you observe the charred barley being brought up to the deck?      A. Yes; I did, sir.

Q. Did you examine it yourself?

A. Yes; I did.

Q. Will you describe to the Court the condition of the charred barley being brought up?

Mr. Detels: If the Court please, we object [311] to this as not the best evidence. There is before the Court a sample of barley which has been testified to as being representative of the most severely damaged barley taken from the hold of the vessel, and I submit that that's the best evidence.

The Court: The objection is overruled.

Q. (By Mr. Crutcher): Did you understand the——

The Court: If the cargo was in a state like that of a written instrument and everybody could read that that was the thing, the Court could see more clearly your point of view, but I cannot see why just because one person, either a bystander or an interested party, took a sample of grain cargo and another did not, or that they took two different samples, but by that circumstance alone it cannot be said that one shall be the only representative of the cargo. The Court's ruling will stand.

Mr. Crutcher: Might I add also, your Honor, that if it became the rule that we had to tender the damaged cargo into court as the best evidence of

(Testimony of Harry Albert Greenwood.)

what it looked like, it would be a very difficult thing to try a cargo damage case.

Q. (By Mr. Crutcher): Captain Greenwood, the question I believe was this: Would you please describe to the Court in your own words the appearance of the charred [312] barley being brought up on deck on about August 25th when the number one lower hold of the Oregon Mail was being discharged?

A. It was badly burned and very hot, and it was brought up in buckets and there were considerable chunks of it that were just stuck together. That's like large pieces of carbon, you might say.

\* \* \*

Q. (By Mr. Crutcher): Did you feel it with your hands? A. It would be too hot to touch.

Q. Well, how did you determine that?

A. Just by standing near it. You could feel the heat coming from it.

Q. Did you observe conditions down in the area from which this damaged or burned barley was being brought?

A. Yes. I noted the deckhead was badly burned. That is, the paint that was on the deck, it was badly peeled and burned and scorched. [313]

\* \* \*

Q. Very well. I have just one more question, Captain. In consulting with Mr. Gow and with Mr. McGinitie, did they offer you advice as to the man-

(Testimony of Harry Albert Greenwood.)

ner of treating this fire condition in the number one lower hold?

A. It was done collectively, sir, with all of us that were in on the discussions. Yes, everybody had their views on it.

Q. Did you engage Captain Johnson to serve as a surveyor for American Mail Line in connection with this matter?      A. No, sir.

Q. Did you know whether anyone else in American Mail Line did?

A. Not to my knowledge, sir. [315]

\* \* \*

### Cross-Examination

By Mr. Detels:

Q. Captain Greenwood, is it not a fact that American Mail Line regularly retains the National Cargo Bureau to supervise the loading of cargoes and in particular grain cargoes aboard its vessels?

A. No; we do not retain them, sir. We call them in. We are free to do that. He's not on a retainer.

Q. Well, do you have any knowledge of whether Captain Johnson was called in by American Mail Line in connection with the loading of the Oregon Mail at Seattle on Voyage 33 in August of 1955?

A. I know he was there, yes, sir.

Q. And do you not know as a fact that he was there in the capacity of a surveyor on behalf of American Mail Line on August 21st?

A. Yes, sir.



(Testimony of Harry Albert Greenwood.)

Q. He was there on behalf of American Mail Line?

A. For the whole loading operation, sir.

The Court: Who was that?

A. Captain Johnson, sir, of National Cargo Bureau.

The Court: He was——

A. He was not specifically called in that day, if that's the way your question is put to me, he [316] was not called down that day.

Q. (By Mr. Detels): He was there on that day, was he not? A. He was there on that day.

The Court: What day?

A. I believe it was the 21st, sir.

The Court: That is the first day you went aboard the ship, was it?

A. Yes, sir, but I certainly did not call Captain Johnson in.

Q. (By Mr. Detels): And he was there at that time in the capacity of a surveyor for the loading of cargo on behalf of American Mail Line, was he not?

A. Yes, I believe he was there that day, sir.

Q. For that purpose? A. Right.

The Court: What——

A. You see, we don't call him in for one specific berth. I mean it was just by chance that the ship came down from Vancouver, arrived at Fisher's and was about to load there. Well, then Captain Johnson or Captain Brady of the same firm, they're liable to be all over the waterfront and they may just hit

(Testimony of Harry Albert Greenwood.)

our ship today and then they may not. It's not that we call them down specifically for that particular job on that day. We do not call them that [317] way.

Q. (By Mr. Detels): Well, does anybody pay them for the time that they are aboard your vessels?

A. Yes. Prior to the ship going offshore we get a certificate from the National Cargo Bureau stating that in their opinion the ship's cargo has been loaded and she's in all respects secured properly for her intended voyage.

Q. And the services that they perform in connection with satisfying themselves as to the issuance of that certificate are performed for American Mail Line?

A. Yes, sir.

Q. Now, when you went down to the vessel on the morning of August 21st, Captain, did you direct any questions to the ship's officers concerning their observations in connection with this situation on board the vessel?

A. I believe the only thing that was asked was how long had this odor been noticeable.

Q. And to whom did you ask that question?

A. That would have been directed to the master.

Q. Did you make any inquiry of the chief officer?

A. Yes, sir. When I say directed to the master, it would be the master and the chief officer at the same time, sir.

Q. Did you ask them what they had observed between the evening of August 20th at Vancouver,

(Testimony of Harry Albert Greenwood.)

B. C., and the time [318] you arrived on board the vessel?

A. Yes; I did, and all they could volunteer was that this odor was present.

Q. Did you ask them whether or not they had observed smoke? A. Yes; I did.

Q. What was their reply?

A. To the best of my knowledge their reply was in the negative, that there was no sign of smoke at that time.

Q. Well, are you able to testify positively at this time that you were told by the master and by the chief officer that they had not observed smoke prior to the morning of August 21st? A. Yes.

Q. Did you direct any questions to the second officer, Mr. Tomlin?

A. I do not believe so, sir, no.

Q. Now, during the period that you were aboard the vessel on the morning of August 21st was any further condition reported to you other than the observation of odor in the area of the smoke detector cabinet?

A. As I recall, the chief—one of the questions that was asked was about whether the fuses had been pulled out to the lights in the holds.

Q. I'm asking you to restrict your answer now to the morning of August 21st. [319]

A. Yes, sir. Yes, and as I recall it was related at that time that they had discovered up in Vancouver that the fuses had been put back again. This cargo of barley was loaded somewhere in the Co-

(Testimony of Harry Albert Greenwood.)

lumbia River, and it's standard procedure that the fuses are pulled out.

Q. It's your present recollection that that information was given to you on the morning of August 21st?

A. Yes; it is, sir. I just feel reasonably sure in my questioning of the master and the chief officer that that question certainly would have been one of my first ones.

Q. Captain, do you recall that your deposition was taken on oral examination in connection with this matter on April 16th of this year?

A. If—I know it was taken, sir. The exact date I'm not sure of, but I'll say yes. [320]

\* \* \*

Q. (By Mr. Detels): Directing your attention to Line 8 on Page 12 of that deposition, Captain Greenwood, do you recall that at that time I asked you, "Have you been advised at any time up to the present that the cargo lights had been turned on in the number one hold at some time after the barley had been loaded in the number one lower hold and left burning for a period," and that you answered, "Yes, I think that came out. Now, whether it came out on that particular day, I don't recall, but somewhere along the line, as I recall, somebody had put the fuses back in again."

In the light of your testimony at the time your deposition was taken, Captain, what is your recollection at this time as to the date on which you were

(Testimony of Harry Albert Greenwood.)

advised, if you were advised, that the fuses had been removed serving the cargo lights in the number one hold of the Oregon Mail?

A. I feel reasonably sure, sir, that it was on that day, the 21st. As I said before, that would be I think one of my first questions to ask, "Were the cargo lights turned out?"

Q. The information which you received from the master at that time, did you transmit that to Mr. Gow?

A. I don't know. I assume Mr. Gow was there when this conversation was going on. [321]

Q. Were you present in the court this morning when Mr. Gow was testifying?

A. I came in late, sir. He was already on the stand.

Q. Were you present when I asked him if he had received any information on August 21st concerning this odor situation or whatever condition existed in the number one hold other than the observation of odor? Do you recall my asking him that question?

A. No, sir.

Q. Well, in any event, whether he was there at the time you received that information or not, you did not pass that information on to him?

A. I don't know, sir.

Q. What was the reason for your immediate concern about whether the fuses had been pulled from the cargo lights of the number one hold?

A. Well, it's just good seamanship, it's standard practice that when you have a cargo like that you



(Testimony of Harry Albert Greenwood.)

pull the fuses. In other words, the loading of that hatch or that compartment had been completed, there would be no further need to go in there, and that it's just good seamanship to pull your fuses to any lights.

Q. Well, when you first went aboard the vessel you concluded on the basis of the information given to you that the odor was coming from the number one lower hold, [322] did you not?

A. Yes; I think we kind of felt that that's where it was emanating from.

Q. And the fact that you inquired about the lights indicates, does it not, that you were concerned about heating of the cargo in that area?

A. I was concerned there was a condition there.

Q. Well, it was your conclusion that the odor which had been reported was caused by heating of cargo, was it not?

A. No, sir. No; I was not sure of that.

Q. Well, did the information that you received that the cargo lights had been left on enable you to form the conclusion that the cargo had been heated and that that was what was causing the odor?

A. No, sir.

Q. Well, from your experience in the merchant marine, Captain, do you have knowledge of the fact that cargo lights will cause heating in grain cargoes?

A. I think it will cause a fire with any cargo where it's in proximity to your hold lights. That's always the danger.

(Testimony of Harry Albert Greenwood.)

Q. Well, they will cause heat in the first instance, will they not?

A. I don't know, sir. [323]

Q. Well, do you know whether or not you have to have heat before you can have fire?

A. No; I don't, sir.

Q. In your experience going to sea have you ever been aboard a vessel where there was any heat damage to a cargo of grain?

A. No, sir.

Q. Had you ever detected this odor before that you detected aboard the vessel on the morning of August 21st?

A. No, sir.

Q. You didn't know what it was at that time?

A. That is right, sir.

Q. And the information that the cargo lights had been left on in this hold full of grain didn't assist you in forming a conclusion as to what the cause of this odor was?

A. No, because the fuses had originally been pulled.

Q. Now, that is not an answer to my question, Captain. I am inquiring whether the information you received that the lights had been left on in the number one lower hold enabled you to form any conclusion as to what the cause of this odor coming from that area was?

A. No, sir.

Q. Well, did you conclude on the morning of August 21st that there was no heating of the cargo in the number one [324] lower hold?

A. I had no way of determining that at all, sir.

Q. Did you conclude at that time that there was

(Testimony of Harry Albert Greenwood.)

no fire in the cargo in the number one lower hold?

A. I can't say that either, sir, no.

Q. Well, did you reach any conclusion on that morning with regard to whether or not the cargo in the number one lower hold was being damaged at that time?

A. The conclusion that was reached by all concerned was that it would take watching, and accordingly the master was instructed to watch that particular area very closely and report immediately if anything should develop.

Q. What is the purpose, if you know, if this standard practice to which you testified of removing the fuses for cargo lights in grain holds?

A. That is for any cargo, sir.

Q. It's not limited to grain cargoes?

A. No, sir, because with any cargo—you can have various types of cargo that's got dunnage, you can use paper as separation, and all that is a dangerous commodity that could create a fire, and, as I say, the pulling of fuses is not just confined to a grain cargo.

Q. Well, then with respect to cargo in general, what is the reason for the practice of removing fuses?

A. To prevent a fire, the possibility of fire. [325]

Q. It's a fact, is it not, Captain, to prevent the heating of the cargo in such a way as to lead to the possibility of a fire, is that not correct?

A. I don't—I can't say it's to prevent the heating of the cargo.

(Testimony of Harry Albert Greenwood.)

Q. Now, did you reach any conclusion as to what should be done after the inspection that you made and the information that you received on the morning of August 21st?

A. Well, it was concluded that the area would take watching and instructions were left with the master that if anything further should develop, that he would contact me immediately.

Q. Was the odor persisting from the area of the number one lower hold when you were aboard the vessel?

A. That's where it seemed to be pinpointed, sir.

Q. Did you know that the vessel was loading cargo at the time you went aboard on August 21st?

A. The reason she was at Fisher's was to load cargo, sir.

Q. And she continued to load cargo after you had made your inspection, did she not?

A. Yes, sir.

Q. And that included the loading of cargo into the number one hold of the vessel, did it not?

A. I do not recall, sir.

Q. Did you issue any instructions at that time that any [326] change be made in the vessel's plan as to the loading of cargo?      A. No, sir.

Q. If you had felt that action was required you could have given that order, could you not?

A. Will you repeat the question, sir?

Q. If you had felt it desirable that the ship stop loading cargo on the morning of August 21st, you

(Testimony of Harry Albert Greenwood.)

could have given an order to that effect, is that not correct?

A. Yes; we could have stopped loading, if that's—I'm not sure how you——

Q. I'm asking whether you personally could have ordered that loading be stopped.

A. I would direct the master, yes, sir, I would direct the master and then the master in turn would direct that the loading would cease.

Q. Did you at some later time direct that loading be discontinued aboard the Oregon Mail?

A. I did not personally, no, sir.

Q. Do you know when that order was finally given?

A. It was some time the following day, Monday.

Q. That would be August——

A. The 22nd. [327]

\* \* \*

(A cargo light was marked Respondent's Exhibit No. A-15 for identification.)

Mr. Crutcher: May it please the Court, it is agreed between Counsel that the exhibit presently being marked for identification is a facsimile or the same sort of lamp, the type of lamp which was installed in the number one lower hold of the Oregon Mail, with the [332] exception of the globe which is now screwed inside of it, and it is also stipulated that the cable which is attached to the lamp fixture is identical or in all material respects similar to the



(Testimony of Harry Albert Greenwood.)  
cable which was installed on the deckhead of the number one lower hold aft of the square of the hatch at the time of this incident.

Mr. Detels: It is so stipulated.

\* \* \*

(Respondent's Exhibit No. A-15 for identification was admitted in evidence.)

Mr. Crutcher: It is also agreed, your Honor, that we will withhold the reading of three depositions which we have if the libelant would wish to commence its rebuttal at this time.

The Court: Does the respondent rest?

Mr. Crutcher: The respondent—I should add one more thing, your Honor. It is stipulated that Mr. Gow would testify that the barley which was in the number one lower hold and in the number one lower 'tween [333] deck at the time of this incident was being carried under the bill of lading which is described in the libel.

Reserving the right to read these additional depositions, the respondent rests at this time.

Mr. Detels: If the Court please, there is the further matter of the additional portions of the chief officer's deposition which we desire to offer, but if the Court wishes to have the live witnesses at this time I will proceed with that.

The Court: You may reserve the right to read the depositions later and proceed now with the taking of oral testimony of witnesses testifying on the stand in open court. [334]

\* \* \*

THOMAS H. WILLIAMS

called as a witness in behalf of libelant, being first duly sworn, was examined and testified in rebuttal as follows:

Direct Examination

By Mr. Detels:

Q. Will you state your name, sir?

A. Thomas H. Williams.

\* \* \*

(The exhibit was handed to the [335] witness.)

Q. (By Mr. Detels): Can you state, Mr. Williams, what Libelant's Exhibit 2 is?

A. It's a sample of barley taken from the—representing the cargo under discussion.

\* \* \*

Q. Who was the person to whom you made delivery?

A. Charles Smith, my partner. [336]

\* \* \*

CHARLES V. SMITH

called as a witness in behalf of libelant, being first duly sworn, was examined and testified in rebuttal as follows:

Direct Examination

By Mr. Detels:

Q. Will you state your full name, sir?

A. Charles V. Smith.

(Testimony of Charles V. Smith.)

Q. And your address?

A. 1920-61st Avenue Northeast, Seattle 55.

Q. What is your business, Mr. Smith?

A. I'm a partner in the Northwest Laboratories.

Q. And what is the nature of that business?

A. It is a commercial testing laboratory.

Q. What educational background have you had, Mr. Smith?

A. My educational background is chemical engineering. I have two degrees from the University of Illinois.

Q. What are those degrees?

A. A Bachelor of Science and a Master of Science.

Q. How long have you been engaged in the business of chemical engineering and commercial testing?

A. Well, chemical engineering has occupied my attention since leaving school in 1934. I've been in the commercial [338] testing laboratory here in Seattle since 1946. Prior to that time I was in industry.

Q. What is the business address of Northwest Laboratories?

A. 200 James Street, Seattle.

Q. Directing your attention to Libelant's Exhibit 2 which is now on the witness stand directly in front of you, can you state whether that exhibit has been in your custody?

A. Yes; it has.

Q. From whom did you receive it?

A. From my partner, Thomas Williams.

Q. And approximately when was that?

(Testimony of Charles V. Smith.)

A. It would have been on about April 22nd or 23rd of this year, I believe.

Q. Was there a seal on the jar at the time the delivery was made to you?

A. Yes; there was.

Q. Have you since opened the jar?

A. I did open it, yes.

Q. Have you removed any of the barley that was in the jar at the time it was delivered to you?

A. Perhaps a half dozen kernels only.

Q. Is all the barley which remains in the jar at the present time barley which was in the jar at the time you opened it? [339]

A. Yes; it was in the jar and has never been removed.

\* \* \*

(Libelant's Exhibit No. 2 for identification was admitted in evidence.)

\* \* \*

(A colored temperature chart was marked Libelant's Exhibit No. 3 for identification.)

\* \* \*

Q. (By Mr. Detels): Can you state what Libelant's Exhibit 3 for identification, is, Mr. Smith?

A. Yes. It is a reproduction in color of [340] various temperatures. Objects that are heated to various degrees emit various temperatures, and this chart shows the increase in color from black to red through the yellows and oranges as temperatures increased.

(Testimony of Charles V. Smith.)

Q. Is that chart one which you use in the regular conduct of your business?

A. Yes. This would be used in connection with pyrometric work or optical pyrometer work for measuring temperature by optical methods.

Q. Is that a standard chart in the industry?

A. Well, this type of chart is, yes, the color range.

Q. Is that particular chart one which is recognized as standard in that field?

A. Well, I believe it is, yes. This would be a close proximity, as close as can be reproduced lithographically of the color conditions of bodies that are heated.

Q. Can you state whether or not in your work you have occasion to determine the temperature of substances by reference to their color?

A. Yes; I've often done that.

Q. Is that a recognized means of determining temperature?

A. Yes; very definitely. The instrumentation field of optical pyrometers is based upon light coming to the pyrometer, the color, and the temperature is judged and controlled accordingly by the machines based on this [341] optical principle of color.

Mr. Detels: I will offer Libellant's Exhibit 3 at this time.

Mr. Crutcher: May I ask a question, your Honor?

The Court: You may do so.

Mr. Crutcher: Mr. Smith, I notice that the head-



(Testimony of Charles V. Smith.)

ing for that picture or guide or whatever it is is entitled, "Basic Guide to Ferrous Metallurgy." Is this used in the steel industry?

A. Pyrometers are used in the steel industry, that is correct. They are also used on gas furnaces. Any material that burns and gives illuminous flame or any material that radiates illuminous radiation can be judged in temperature range by color.

Mr. Crutcher: Would that include organic matter?

A. Yes. Organic matter in burning conditions would be reduced to carbon and you would have the radiation or the burning of the carbon similar to that in a gas flame or a coal flame or any other material. It all reduces itself to the simple phenomena of color radiation due to temperature.

Mr. Crutcher: That is the burning temperature of the carbon? A. That is correct. [342]

Mr. Crutcher: But not necessarily of other matter which might be burning at the same time?

A. Well, they are just awfully, awfully close. The radiation pyrometers make no distinction essentially between the type of fuels that are used. For instance, the oil burning range, the temperature of an oil burner in a furnace would be in the orange-red range, and you could judge the approximate temperature of coal from the same type of [343] color.

\* \* \*

Mr. Crutcher: One other question. You have mentioned the examples of petroleum oil and coal, and

(Testimony of Charles V. Smith.)

most of those are carbon compounds, are they not?

A. Yes.

Mr. Crutcher: Well, I don't want to complicate this unduly, Mr. Smith, but I'm trying to determine from you whether this gauge which you have is an accurate reflection of the burning of other organic materials than those of pure carbon?

A. With the exception of the gases, all organic materials are heavily laden with carbon. Gasoline is heavily carbon. That's your petroleum. [344] Coal is heavily laden with carbon. Flour, starch, sugars, are heavily laden with carbon. The field of organic chemistry basically is the study of carbon compounds, and——

The Court: That is sufficient.

Mr. Crutcher: Yes, it is. For what it may be worth, your Honor, I have no objection to the use of this——

\* \* \*

(Libelant's Exhibit No. 3 for identification was admitted in evidence.)

Q. (By Mr. Detels): Mr. Smith, in your experience is there a correlation between temperature and color with respect to organic material?

A. Yes. Any of your solid material, be it metal or carbon, would radiate an equivalent color for a given temperature.

Q. Can you state what temperature is required in order to produce visible light under ordinary daylight lighting conditions?

(Testimony of Charles V. Smith.)

A. Oh, in the neighborhood of 1,200 degrees would be the minimum. 1,200 degrees would produce a color which would [345] just be visible.

Q. Is that what you would refer to as a glow?

A. A dull red, a very dull red, just into the red range, just from the black into the red range.

The Court: Is that Fahrenheit?

A. Fahrenheit, your Honor, yes.

Q. (By Mr. Detels): Did you misunderstand my question, Mr. Smith? I asked you—well, I will strike the question and ask you this: At what temperature is it possible to observe a glow condition in a product such as barley?

Mr. Crutcher: Now, just a moment. Your Honor, if this is predicated upon the answer to the previous question I will object. Counsel is assuming here a glow visible in ordinary daylight. There has been no evidence that any ordinary daylight was down in this hold.

The Court: The objection is sustained.

Q. (By Mr. Detels): Now, Mr. Smith, what is the composition of barley?

A. Barley is made up of starch, sugar, cellulose, water—

The Court: Wait just a moment. Starch, sugar, cellulose, water—

A. Water, proteins, fats and ash.

The Court: How does this compare in respect to those component parts with oatmeal and wheat grain and like cereals? [346]

A. Oh, they're all in the same general class. I

(Testimony of Charles V. Smith.)

don't believe, your Honor, I could tell offhand the specific differences, but they're all predominately starch. They're more, I think, than fifty per cent starch. The proteins will run in the neighborhood of ten or fifteen per cent. Fats will vary. For instance, corn might run a little higher in fats than the barley, but in general they are very close. [347]

\* \* \*

Q. (By Mr. Detels): Mr. Smith, have you performed experiments involving the application of heat to number two two-rowed western barley?

A. I have.

Q. Has that been in connection with this case?

A. Yes; it has.

Q. Have you observed and determined in that connection the processes or changes which occur as heat is applied to barley? A. I have.

Q. Will you state what changes or processes occur in number two two-rowed western barley when heat is applied to the barley?

A. Well, the first thing that is noticeable, at the boiling point of water, which is 212 degrees, is the driving off of the water or the distilling of the water from the barley grains. That would happen in the drying of clothes or anything. The ten per cent or thirteen per [348] cent of moisture which is normally present is driven off into water vapor. Then as temperature is increased more and more, as you approach 400 degrees you get a browning effect on the barley which is similar to the crust on bread,

(Testimony of Charles V. Smith.)

the browning of the cereal product. As you then increase the temperature to toward 500 degrees one begins to smell decidedly the parched shell of overcooked cereal. At 550 degrees Fahrenheit, approximately, we get into decided blackening and distillation, destructive distillation or actual breaking down of the chemical structure of the barley in which acrid fumes are given off and the sugars are broken down and the starches are broken down and we get the smell of burned rags or burned cereals, and at the same time a temperature increase is given automatically by this destructive distillation which will raise the temperature still further of the barley. Then——

\* \* \*

Q. (By Mr. Detels): Will you state if you know, Mr. Smith, at what temperature charring or a char product is produced when heat is applied to number two two-rowed western [349] barley?

A. Well, charring will begin at about 500 or 550 degrees Fahrenheit, and charring will be produced and very thorough when you've reached 800 degrees or thereabouts.

Q. Incidentally, will you state if you know in what temperature range the commercial production of charcoal is performed?

A. It is performed within that range. Wood is a vegetation product the same as barley, it behaves quite similarly, and charcoal is produced likewise in that range of 550 to 800 degrees, the normal range of producing charcoal from wood.



(Testimony of Charles V. Smith.)

Mr. Detels: May the witness be handed Libelant's Exhibit 2? [350]

\* \* \*

Q. (By Mr. Detels): Mr. Smith, do you have an opinion as to whether the barley contained in Libelant's Exhibit 2 has reached temperatures in excess of 800 degrees? A. I have an opinion.

Q. On what factors do you base your opinion?

The Court: What experiences in your life, among other things?

A. Tests that I have run on a similar product, presumably the same material.

The Court: Do you mean out of this same cargo on board this Oregon Mail?

A. No, your Honor; out of number two two-rowed barley which was obtained locally, which as I understand it is the identification of this barley originally.

The Court: In that connection the Court is interested in experimentations for similar purposes and results throughout the course of his professional life.

Mr. Detels: Very well.

The Court: That is one of the things that [351] might tend to qualify him.

Mr. Detels: If the Court please, may this be marked?

The Court: It will be marked.

The Clerk: Libelant's Exhibit No. 4.

(A small jar with contents was marked Libelant's Exhibit No. 4 for identification.)

(Testimony of Charles V. Smith.)

\* \* \*

Q. (By Mr. Detels): Will you examine Libelant's Exhibit No. 3, Mr. Smith, and state what that is, if you know?

A. Libelant's Exhibit 4 is number two two-rowed western barley which I have subjected to heat in the laboratory.

Q. Will you state how you conducted the experiment to which [352] you just testified?

A. Yes. The quantity of wheat, essentially the quantity that's contained in this bottle——

The Court: Wheat or barley?

A. Barley. I'm sorry, your Honor.

A. ——was put in a little metal container and put into an oven, an electric oven which was at 600 degrees Fahrenheit, and was left for a period I think of twenty minutes, and during that time it produced the char that is shown here, there are chunks sticking together, during which time the exothermic action or the self-heating action became evident and the temperature of the material jumped automatically to around 685 degrees, and at the end of twenty minutes the char was removed from the little can and put in this bottle.

Q. (By Mr. Detels): How did you determine the maximum temperature which the barley itself reached?

A. Buried in the barley was a very fine wire thermocouple, which is just an electric thermometer, the wires of which are finer than those on this tag,

(Testimony of Charles V. Smith.)

and they were buried in it all the time during the test, and an electric instrument reads the temperature.

Q. Will you restate, Mr. Smith, the temperature of the furnace in which this experiment was conducted?

A. Yes. 600 degrees Fahrenheit was the temperature of the [353] furnace.

Q. And will you restate the maximum temperature which the barley reached inside the furnace?

A. 685 degrees.

Mr. Detels: I will offer Libelant's Exhibit 4.

Mr. Crutcher: We have no objection to it upon the basis stated.

The Court: It is admitted.

(Libelant's Exhibit No. 4 for identification was admitted in evidence.)

The Court: I think one important thing that he stated was that the barley sample was exposed to the 600 degree temperature for twenty minutes. The length of exposure is doubtless important. You may proceed.

Q. (By Mr. Detels): Mr. Smith, based on the experiment to which you just testified are you able to state what factors you based your opinion on with respect to whether or not the barley in Libelant's Exhibit 2 has reached a temperature in excess of 800 degrees?

A. Well, the absence of ash in Exhibit 2 would

(Testimony of Charles V. Smith.)

indicate that the barley had never degenerated from glowing.

The Court: That last word?

A. From glowing, or fire. There is absolutely no ash in this, no graying either in the bottom of the jar or on any of the kernels. They are still [354] shiny from the destructive distillation products which have collected on the surface and which also tends to eglomerate or form the chunks that are in the bottle. That condition is identical to Exhibit No. 4 which I prepared in the oven.

Q. (By Mr. Detels): Based on the experiment which you conducted, what is your opinion with respect to the maximum temperature to which the barley in Libelant's Exhibit 2 has been subjected?

A. My judgment is that it may have been subjected to 600 degrees perhaps for a little longer time or perhaps as high as 800 degrees for a shorter period of time than I have in this bottle. It would fall in that range, in my judgment.

Q. Have you examined Libelant's Exhibit 2 for the presence of ash?

A. I have.

Q. You made reference to your observation of chunks. Will you explain what significance you attach to that fact?

A. Well, barley will produce tars, broken down sugars which are gummy, and some volatile smokes, just as wood does when it is heated, and those gummy materials can be found collected on the can in which I treated this sample of barley in No. 4 or on the inside of wood chimneys, wood burning

(Testimony of Charles V. Smith.)

stoves. Those tars are binders, they will stick, [355] and those have stuck and clumped the barley in the lumps, the barley grains in lumps, in both Exhibit 2 and Exhibit 4.

Q. Now, you made reference in describing the experiment you performed to the term "destructive distillation." Will you explain what that is and at what temperature it occurs with respect to barley?

A. Well, in any vegetative product, including barley, destructive distillation begins at approximately 550 degrees Fahrenheit. Destructive distillation means simply that the chemical structure is being destroyed. It breaks down from starches and sugars and proteins into many other new chemicals which are different from the chemical structure of the barley itself. Its nature is this tarry mass to begin with and vapors and smoke. It's actually destroyed at that point and the chemical barley is converted to other chemical compounds.

Q. And is that related to the chunking or eglomeration?

A. Yes; that will cause the chunking and the eglomeration. Actually in chimneys in wood burning places where those tars are left to collect for a long period of time they will plug the chimney completely, and we have the same thing from this vegetative product.

Q. Now, if those tars and other products which are related to the chunking are exposed to heats in excess of 800 [356] degrees, what is the effect?

A. They should be reduced to perfect chars then.



(Testimony of Charles V. Smith.)

They should lose their tackiness, they should be further destructively distilled so that the only remaining part is carbon or pure char. They are no longer tacky, they are no longer resinous, they have been reduced essentially to pure carbon.

Q. Have you examined Libellant's Exhibit 2 with reference to whether or not that barley has been reduced to pure char?

A. Well, from all appearances it hasn't been reduced to pure char. These chunks that are sticking together show signs of a shiny, tarry substance coating the grains which most probably is the tarry mass that's holding it together. They are rather shiny in nature. Pure char has a dull appearance. Charcoal is dull black, flat black, is not shiny. [357]

\* \* \*

Q. (By Mr. Detels): Mr. Smith, asking you to examine the cable which is attached to the fixture as a part of Respondent's Exhibit A-15, I'll ask you to state whether or not you have performed any experiment with identical cable?

A. Yes; I have performed experiments.

Q. That asked for a yes or no answer. Your answer is yes?

A. Yes.

\* \* \*

(A metal box with contents was marked Libellant's Exhibit No. 5 for identification.) [358]

\* \* \*

Q. (By Mr. Detels): Handing you what has

(Testimony of Charles V. Smith.)

been marked as Libelant's Exhibit 5 for identification, Mr. Smith, can you state what that is?

A. Yes; I can state what it is. [359]

Q. Will you do so, please?

A. This is a section of the lamp cable which was delivered to me in the laboratory, a cable which is similar in construction to this Exhibit A-15, a section of which was cut approximately an inch and a quarter long, embedded in barley, the whole of which then was put into an electric furnace and set at a temperature of 650 degrees Fahrenheit.

Q. How long was the experiment carried on?

A. That was left in the furnace for twenty—about twenty-two minutes.

Q. Did you determine the maximum temperature which was reached inside of the furnace?

A. I determined the maximum temperature which was reached in the barley proper adjacent to this section of cable within the container. The furnace temperature was set and controlled at 650.

Q. What was the barley temperature?

A. The barley temperature wound up at about 725 degrees at the end of the time.

Q. Is Libelant's Exhibit 5 the cable with which you conducted that experiment?

A. That is correct; this is the section of cable which went through the furnace at 650 degrees surrounded by the number two two-rowed western barley, and the barley [360] was removed afterwards to show the cable that is in this container under Exhibit 5.

(Testimony of Charles V. Smith.)

Mr. Detels: I will offer Libellant's Exhibit 5.

Mr. Crutcher: I'm sorry, but I don't understand how this is relevant to any matter in controversy here, your Honor.

The Court: Do you object to it?

Mr. Crutcher: I do.

The Court: The objection is sustained. We have had enough experimentation in this case.

(Libellant's Exhibit No. 5 for identification was refused admission in evidence.)

\* \* \*

### Cross-Examination

By Mr. Crutcher:

Q. I'm interested in your description, Mr. Smith, of the exothermic reaction in barley.

A. Yes.

Q. I believe you indicated that when you experimented with barley in a furnace at a temperature of 600 degrees the [361] temperature jumped, you said, to about 685 degrees at the end of the twenty minutes?

A. Yes.

Q. Could you account for that?

A. No. Mother Nature takes care of that. That's a natural phenomenon. I have nothing to do with that. It's described as an exothermic reaction. It's a sort of an automatic thing that occurs when you heat wood or vegetation or barley to 550 degrees. It starts to distill destructively, and with that comes an increase in temperature automatically.

(Testimony of Charles V. Smith.)

Q. How high does that exothermic, the increase in temperature from exothermic reaction continue?

A. Well, in this case it stopped at 685 degrees. In wood distillation——

Q. Well, excuse me. A. Yes.

Q. But to continue with this particular experiment, I believe you said you took it out of the furnace at the end of twenty minutes?

A. That's correct; yes.

Q. So that so far as the tail end of the exothermic reaction is concerned you would have no knowledge based on that experiment which you described?

A. No, but it is known, well known, that that exothermic [362] reaction is rather mild in nature; that even in wood products which are heated for long periods of time, that that will not carry itself to more than seven or eight hundred degrees. They actually utilize that heat that is generated automatically as part of the charring process to minimize any fuel costs that's required in producing char, and that same thing is evidenced here.

Q. Now, regarding the comparison between the sample which has been identified, shown to you as Libelant's Exhibit 2 and the jar which you have before you as Libelant's Exhibit 4, did you consider the effect of water on the sample marked as Libelant's Exhibit 2?

A. The effect of water?

Q. Yes.

A. I didn't know there was any free water involved. I'm unaware of that. [363]

(Testimony of Charles V. Smith.)

The Court: Proceed with these depositions, if you have any depositions you wish the Court [364] to consider in connection with your case in chief, respondent's case in chief.

Mr. Crutcher: Thank you, your Honor. I will do so at this time.

The Court: The Court does not promise anyone that there will be any more evidence taken after this rebuttal of the libelant has been finished. Proceed. Surrebuttal is not received as a matter of right. You may proceed. [365]

\* \* \*

Mr. Crutcher: I wish to offer a part of the deposition of Mr. Wallace C. Hardie dated April 26, 1958. It is my understanding that this deposition has already been opened and published, and I will commence on Page 3, Line 6.

(A copy of the deposition was handed to the Court.)

(Thereupon, the deposition of Wallace C. Hardie was read as follows.)

#### DEPOSITION OF WALLACE C. HARDIE

"Q. (By Mr. Crutcher): Will you please state your full name?

"A. Wallace—do you want the initial?

"Q. Yes.

"A. C. Wallace C.—that is the way I generally sign it. Wallace C. Hardie.



(Deposition of Wallace C. Hardie.)

"Q. Thank you. Where do you live, Mr. Hardie?

"A. I live at 6525 S.E. Ramona Street, Portland 6, Oregon.

"Q. What is your occupation?

"A. I am working at the present as a night and relief mate.

"Q. How long have you been going to sea?

"A. Well, I started to sea in 1911 in the Navy. First, I done three years in the Navy and four years in the Coast Guard, and since 1919 with the exception of two years I have been in the merchant marine.

"Q. And what ratings have you held in the merchant marine? [366]

"A. Well, able seaman, boatswain, and on some ships the so-called quartermaster where they delegate certain able seamen as quartermaster and third mate, second mate, and chief mate.

"Q. And when did you get your first mate's license?

"A. My original license was issued in 1924.

"Q. And when did you acquire your license as chief mate?      A. I got that in 1926.

"Q. And is that license still in effect?

"A. The renewal?

"Q. They are renewed?

"A. Yes; the chief mate's license is in effect.

"Q. You have had a chief mate's license continuously since that time?

"A. I have had a chief mate's license all that time.

(Deposition of Wallace C. Hardie.)

“Q. That is what I meant. And how long have you been acting as night mate at the port of Portland?

“A. Well, I came up here in '46, but I don't know whether it was the end of '46 or whether it was the beginning of '47 when I started work as a night mate. I believe it was close to the end of the year, I know that.

“Q. Have you been working as a night mate since that time?

“A. No; I had one short session out at sea. One short period.

“Q. Aside from that, though, have you been serving as a [367] night mate or relief mate?

“A. Yes; off and on here.

“Q. Are you a member of the union?

“A. Masters, Mates and Pilots, Local 90.

“Q. And were you a member of that union in 1955?

A. Yes.

“Q. Now, Mr. Hardie, I am referring now to the service that you performed on the Oregon Mail back in August of 1955, and I will ask you if you recall acting as night mate aboard the Oregon Mail during the evening watch on August 18 and during the first watch on August 19 of 1955?

“A. Yes; I recall that.

“Q. Now, do you recall that during the evening watch on August 18, someone questioned you about the lights in the No. 1 hatch?

“A. Repeat that question again.

“Q. Certainly. During the evening watch on

(Deposition of Wallace C. Hardie.)

August 18, did anything occur with relation to the lights in the No. 1 hatch?      A. Yes; there was.

“Q. And would you state what that occasion was?”

Mr. Detels: If the Court please, I move to strike the following answer as hearsay.

The Court: Give me the line, please. [368]

Mr. McMullen: Page 5, Line 18, your Honor.

The Court: 19?

Mr. Detels: 18.

The Court: What he said is subject to the objection.

Mr. Crutcher: Your Honor, I offer it only for the limited purpose of stating what the occasion was and not as proof of the truth of the matter asserted.

The Court: The objection will be sustained.

Mr. Crutcher: Might I return to that, your Honor, for the purposes of an offer of proof at a later time?

The Court: Yes, you may reserve the right to later make an offer of proof.

Mr. Crutcher: Thank you.

The Court: And the sustaining of the objection was with reference to the words beginning on the 21st line with the word “and” and ending with the period in Line 22. The rest of it the Court does not sustain the objection to, if you wish to read the rest of it.

Mr. Crutcher: I understand, your Honor. I’m

(Deposition of Wallace C. Hardie.)

afraid the rest of it doesn't do much good without that. I'll go on to the next question.

"Q. Now, is this referring to the No. 1 hatch?"

Mr. Detels: I will state the same objection [369] as hearsay to the portion of that answer beginning on Page 6.

The Court: It seems to me that——

Mr. Crutcher: Your Honor, excuse me, I didn't realize this was the one in question. I'm inclined to agree with that.

The Court: The objection is sustained.

Mr. Crutcher: I will offer the following portion of this answer, your Honor, starting with Line 24:

"A. No. 1 hatch forward. At that time I was engaged in another emergency deal in the after deck and was on my way to that when this fellow approached me on the deck about this matter; and I don't know—he didn't give me the full details of just what was wrong, and I says to him——"

The Court: No, at that semicolon, the objection will be sustained at that semicolon.

Mr. Crutcher: Your Honor, I'm sorry, but I don't——

The Court: What goes after that semicolon in the first line on Page 6.

Mr. Crutcher: Your Honor, I believe that I'm entitled to show what the witness said to someone else. I was going to end the offer of proof with the word [370] "switches?" in the middle of Line 4, and I do make that offer of proof at this time to

(Deposition of Wallace C. Hardie.)

show that this witness would have testified to that much of the question.

The Court: Do you wish to make any statement?

Mr. Detels: Yes, I do, your Honor. I object to——

The Court: Respecting offering Counsel's statement that he has a right to show what the witness testifying in his deposition said to somebody else.

Mr. Detels: Yes, I do. I object to that as hearsay, your Honor. A statement that the witness has made on some other occasion is hearsay.

Mr. Crutcher: Your Honor, how could anyone ever prove what anyone else said then? If what someone else said to me is hearsay and I can't say what he said, certainly I'm entitled to call him to the stand to establish what he said. I've never heard of such a contention, and I'm offering this only as evidence of the transaction which occurred on that night, and I have excluded from my offer of proof the answer which was made by the walking boss or longshore foreman to Mr. Hardie.

The Court: I am going to ask you to stop your other work tonight and look up some law and let me hear you tomorrow on the authorities. [371]

Mr. Crutcher: Thank you, your Honor. I will.

The Court: I need a little review on that point, Mr. Crutcher. It may be that you can re-educate me on that. I do not seem to feel any familiarity with that point of evidence which you put forward with such a convincing statement. I just do not quite



(Deposition of Wallace C. Hardie.)

wake up to any familiarity I ever had with that proposition you advanced, and I would like you to let us know some more about that tomorrow, and likewise I would like objecting Counsel to advise what he can find regarding it.

Mr. Crutcher: Now dropping down next to Line 10 on Page 6, the question commencing:

“Q. Now, what did you do after he told you that?

“A. Well, I went down——”

The Court: Just a minute. Do you have any objection to this?

Mr. Detels: I have no objection, your Honor, to——

The Court: To what he did?

Mr. Detels: To what he did.

The Court: Although acting upon hearsay.

Mr. Detels: That is——

The Court: That is my understanding of one of the rules of evidence, that this is proper, and you may proceed. [372]

Mr. Crutcher: Thank you, your Honor.

“A. Well, I went down and got the electrician up, the electrician on watch, that was on duty.

“Q. Did you give any instructions to the electrician?

“A. Yes, I——”

Mr. Detels: I desire to state the objection that the following answer is hearsay.

The Court: The Court will not permit the reading of it until I hear from Counsel tomorrow.

(Deposition of Wallace C. Hardie.)

Mr. Crutcher: Thank you, your Honor. May I reserve the right to make my offer tomorrow on that, or I will make the offer at this time, your Honor, as long as we are at that point.

I offer to show that the witness answered in response to this question, "Yes, I informed him that there was some difficulty up there and to go up and see what he could do about it."

It is understood that the ruling on the admissibility of that is reserved until tomorrow morning.

The Court: Yes, it is. [373]

\* \* \*

Mr. Crutcher: I now turn to Page 8 of the same deposition commencing at the top of the page:

"Q. What were they doing at the No. 1 hatch during the evening watch on August 18? [374]

\* \* \*

"A. Well, they were part of the time preparing to load and loading lumber.

"Q. Where were they loading that lumber?

"A. In the lower 'tween deck.

"Q. And what was the need for lights at the hold there?

"A. Well, the need for lights is always—they always need lights in the holds.

"Q. For what purpose?

"A. To work the cargo and in storing the cargo, to see.

"Q. You mean for the longshoremen to see?

(Deposition of Wallace C. Hardie.)

“A. The longshoremen to see in the cargo hold down there.

“Q. Now thereafter during the morning watch on August 19, did they complete loading that lumber?

“A. That was the morning of the 19th, the day they sailed?

“Q. Yes.

“A. I believe they did, yes.

“Q. Would it help you to refer to the log book?

“A. It possibly would.

“Q. Showing you a rough, what purports to be a rough log book for the Oregon Mail Voyage 33, which has previously been marked on the back with the words ‘Libelant’s 1, Willmire,’ and ask you”—— [375]

\* \* \*

Mr. Crutcher: I believe it will be stipulated that that is the log book now in evidence.

Mr. Detels: It will be.

“Q. I will ask you to refer to the log book entries for August 18, that is, the night entries?

“A. The night entries that I made?

“Q. Yes, and I will ask you if those are in your handwriting, beginning with this entry here at 1630?

“A. That’s my writing and then the entirety down to 2400.

“Q. Now, showing you the entries for Friday, August 19, I will ask you to refer to entries at the

(Deposition of Wallace C. Hardie.)

top of the page beginning with the figures 000 and ask you whether the entries from that time until 0800 are in your handwriting?

"A. Yes, that is all in my writing up till five o'clock there.

"Q. Well, you will notice an entry at [376] 0800?

"A. Up to eight o'clock. I didn't notice it. Yeah, up to and including that one at the time I was relieved.

"Q. The witness here is referring to the entry at 0800. The night mate is relieved by the ship's officers. Now, Mr. Hardie, I will ask you by referring to these entries for the early morning of August 19 if you can state whether or not the longshoremen completed the loading of lumber during that watch?

"A. Well, this entry is at 0400, 0430. That would be four-thirty in the morning, a.m. that they finished loading the lumber. One and No. 5. I have got the lower holds there, but that probably refers to No. 5. It couldn't possibly refer to No. 1.

"Q. Would that correctly be No. 1 lower 'tween deck?

"A. Yes, it would be.

"Q. Does it say where it started?

"A. When they started, at seven o'clock the night before. I believe so.

"Q. But I am only concerned now, Mr. Hardie, with the concluding of the work.

"A. All right.

(Deposition of Wallace C. Hardie.)

“Q. Now, having examined these log entries, do you recall whether they did finish loading the lumber during your watch in the early morning hours?

“A. Well, they finished as far as my watch was concerned at [377] four or four-thirty in the morning because at five o'clock is their knocking off time. Now, whether the day gangs came back there and went in there again and done anything down in that hold, I don't know. That would be in somebody else's entries.

“Q. I call your attention to an entry at 0430 which reads in part, 'No. 1——'

“A. Yes.

“Q. 'No. 1 gang covered 'tween deck and replaced shoring.'

“A. Yes.

“Q. Would that indicate that they had completed——

“A. That would indicate to me that they had certainly finished then when they put the shoring back up and everything. It was finished there.”

Mr. Crutcher: Turning next to Page 11, Line 17.

“Q. Do you remember now at this time whether on the morning of August 19 you either turned off the lights at the No. 1 hatch or had someone else do that?

“A. Whatever lights was turned off, I turned them off.

“Q. Well, what I am asking now is whether you at this time remember that?



(Deposition of Wallace C. Hardie.)

"A. Yes.

"Q. And did you turn them off yourself?

"A. Yes. I turned off what is termed the deck lights, that is the deck lights including whatever the cluster lights [378] that they use, the portable cluster lights. Those are the ones that I turned off, and in doing that I turned the mast lights off in the locker. Those are either turned off at the individual switches outside, or we unscrew the plugs and pull them out.

"Q. Yes. Were you aware at that time that in addition to the cluster lights there may have been lights in the hold which were on?"

Mr. Detels: I'll object to that question as leading, and in addition it is asserting facts on which there has been no evidence or testimony.

Mr. Crutcher: May it please the Court, I'm here referring to whether the witness was aware of any such fact, I'm not asserting it as a fact.

The Court: The objection is overruled.

"Q. You may answer that. Maybe you would like to have him repeat the question?

"A. Yes, if I could have that read back, please.

"(Whereupon the reporter read the question.)

"A. Lights on in the hold—it should have been.

"Q. Were you aware that there was barley stowed in the No. 1 lower hold at the beginning of your watch on August the 18th?

"A. Yes.

(Deposition of Wallace C. Hardie.)

“Q. Were you aware that the fuses had been pulled in the [379] lights for that hold?

“A. No. In that particular instance, I wasn’t aware of it at the time.

“Q. When you went off watch, did you have any knowledge that there were lights on in any of the No. 1 holds?

“A. No, sir.”

Mr. Crutcher: On Page 21, which is cross-examination, on Line 11:

“Q. Well, you yourself don’t know whether the portable cluster lights were working on the evening of August 18?

“A. Oh, yes, they was bound to have been working, or I would have been notified sooner.

“Q. Well, at the time he——”

Mr. Crutcher: I believe, your Honor, this is referring to the stevedore foreman.

“Q. ——notified you of this condition, do you know whether or not the cluster lights were then working? I would like you to tell me if you can—not what you assume, but whether or not you know whether the lights were then working?

“A. Well, they were working. Now, when he notified me, apparently something was wrong. One of them wasn’t working or two of them had went out or something that had went out. Apparently, that was my idea. When I couldn’t put the switches on, I got an electrician to [380] fix it.”

Mr. Detels: I will move to strike that answer as

(Deposition of Wallace C. Hardie.)

being speculative and not based on knowledge of the witness.

Mr. Crutcher: It appears to me that the first sentence of the answer is responsive.

The Court: The objection is overruled. The answer will stand.

“Q. Did he ask you to fix the cluster lights or have them fixed?”

“A. He said they——”

Mr. Detels: I’ll object to that as calling for hearsay.

The Court: That objection is sustained.

Mr. Crutcher: Your Honor, may I reserve the right to argue that in the morning?

The Court: You may. There will be no argument about it. If you want to make an offer of proof, you may do so.

Mr. Crutcher: I would like to do so at this time, your Honor. I offer——

The Court: The first sentence is subject to the objection, but the next two do not seem to be, and the objection goes and is sustained as to the last sentence, “He said” and so forth. The two [381] sentences beginning with “He said.”

Mr. Crutcher: I believe your Honor’s ruling is correct, and I will offer only the center sentences. I accept that ruling.

The Court: The “He said” sentences are objected to and the objection is sustained. You may proceed.

Mr. Crutcher: Thank you, your Honor.

(Deposition of Wallace C. Hardie.)

“Q. Did you yourself enter the No. 1 resistor house at the time that this request was first made to you?

“A. No, sir.”

Mr. Crutcher: I will next go down to Line 13.

“Q. Did you enter the resistor house at any time during that watch from four in the afternoon until eight o'clock the following morning?

“A. I entered there and put the deck lights, the mast lights and these receptacle places and switches on.

“Q. You turned them on?

“A. Well, that's what we do. We turn the lights on, yes, at sundown. That is generally before the longshoremen, just before they come.

“Q. And you personally did that?

“A. Yes.”

Mr. Crutcher: I now turn, your Honor, to Page 36, Line 20, commencing with the question: [382]

“Q. Now, is there a customary procedure with relation to the turning off of the lights in the holds which are loaded with grain at this port?

“A. Fixed lights?

“Q. Well, either fixed or cluster?

“A. Fixed lights, yes, but other lights there would be none down there.

“Q. All right now, with reference to fixed cargo lights in holds which are loaded with grain, can you say what the customary procedure is?

“A. They remove the fuses.

“Q. What is the purpose of removing the fuses?

(Deposition of Wallace C. Hardie.)

“A. So that nobody can put the lights on in there. Nobody could accidentally put a switch on and throw a light on in there.

“Q. And were you acquainted with that custom in August of 1955?

“A. Yes.” [383]

\* \* \*

At the conclusion of the trial yesterday, your Honor, we had been reading from the deposition of Mr. Hardie, and I believe that Mr. Detels was to offer cross-examination of Mr. Hardie to complete the reading of that deposition. Is that correct?

\* \* \*

Mr. Detels: No cross-examination.

The Court: Is there anything else, Mr. Crutcher? If there is no cross, how can there be any redirect?

Mr. Crutcher: There is no redirect, your Honor. Your Honor, just at the moment I'm reading those three portions which constituted an offer of proof in Mr. Hardie's deposition, the ruling upon which was [389] reserved until this morning.

The Court: Yes.

\* \* \*

Mr. Crutcher: On Page 5, your Honor, excuse me. The question was, “Now, is this referring to the No. 1 hatch?” and the answer consists of about five sentences, your Honor.

The Court: One of the answers objected to, as



(Deposition of Wallace C. Hardie.)

I recall, was in Line 21 beginning with the word "and," "and said" and so forth.

Mr. Crutcher: Yes, your Honor. I'll go back to that question first to take it in order. I would like to offer the first sentence of the answer, which excludes the remark——

The Court: Wait just a minute. Let us clarify this. [390]

Mr. Crutcher: Yes, your Honor.

The Court: Do you withdraw your offer of the witness' statement that he said to somebody or that they said something to him?

Mr. Crutcher: That somebody else said something to the witness.

The Court: There is no trouble about that. Of course the Court and all connected with the case readily agree that that is hearsay, is it not?

Mr. Crutcher: Insofar as it is offered as proof of the truth of what was said.

The Court: The Court yesterday ruled it out for any and all purposes on the ground that it is hearsay, and the Court adheres to that ruling now, but the question left for consideration is whether or not what this witness now testifying now on the stand, so to speak, and giving his deposition, said that he said on a former occasion when somebody was not there.

Mr. Crutcher: That is correct, your Honor. Referring first to the question commencing between Lines 17 and 18 on Page 5, "And would you state

(Deposition of Wallace C. Hardie.)  
what that occasion was?" I wish at this time to offer the first sentence of the answer.

The Court: Is there any objection?

Mr. Detels: No objection, your Honor. [391]

The Court: That is admitted.

Mr. Crutcher: May I read the answer then, your Honor?

(Reading): "Well, in my period of duty that night, I can't recall the exact time, one of the foremen come to me on the deck of the vessel."

The next question, "Now, is this referring to the No. 1 hatch?"

The answer to that one, your Honor——

The Court: Has it already been read?

Mr. Crutcher: ——has already been offered.

The Court: Has it already been received?

Mr. Crutcher: It has—no, it has not been received. The objection was made to the statement by Mr. Hardie, the witness who was then testifying.

The Court: Is there any objection to this now, since the objectionable matter in the preceding answer has been excluded and now this refers in effect only to the matter admitted?

Mr. Detels: If the Court please, I do object to the portion of that answer beginning on Line 1 with the word "and" and continuing to Line 6.

The Court: That is at the top of Page 6?

Mr. Detels: Yes, your Honor.

The Court: Read the answer down to [392] that point, Mr. Crutcher.

(Deposition of Wallace C. Hardie.)

Mr. Crutcher: May I read the parts which I offer?

The Court: Down to that point, if you wish to go that far.

Mr. Crutcher: Yes, your Honor. I'll read the question again.

"Q. Now, is this referring to the No. 1 hatch?

"A. No. 1 hatch forward. At that time I was engaged in another emergency deal in the after deck and was on my way to that when this fellow approached me on the deck about this matter——"

The Court: I think it is there you begin your objection.

Mr. Detels: That's correct, your Honor.

Mr. Crutcher: I wish to offer the following additional portion of that answer—this is the offer:

"——and I don't know—he didn't give me the full details of just what was wrong, and I says to him——"

The Court: Are you going to offer that now, "I says to him"?

Mr. Crutcher: Yes, your Honor.

The Court: Do you object to that?

Mr. Detels: I do, your Honor. [393]

The Court: I can see it, you can mark the place. It is Line 3.

Mr. Crutcher: Yes, your Honor.

The Court: And it extends down to where?

Mr. Crutcher: It extends down to the end of the quotation of the remark made by the witness who

(Deposition of Wallace C. Hardie.)

was then testifying, "Have you tried the switches?"

The Court: Do you object to that?

Mr. Detels: I do, your Honor. I have some authority.

The Court: What authority do you have?

Mr. Detels: In the case of Dunn versus Bushman, at 169 Washington 395, the Court stated, "It is a well settled general rule that statements made by a witness to other persons are no exceptions to the hearsay rule, nor can evidence of what a witness has said out of court be received to fortify his testimony."

Mr. Crutcher: May it please the Court, this statement is not offered for the purpose of fortifying his testimony, it is offered to state what was done on this occasion. It is not hearsay in any sense of the word because the witness who stated the words was then before the Court. This is not offered for the proof of any statement about what was done, it is to show what the witness was talking about at that time, what [394] the nature of the transaction was. I respectfully submit that this is not hearsay under any definition of hearsay and that it is admissible as evidence of what was done at that time.

The Court: The Court is of the opinion that it is not admissible over objection because it is in effect permitting the witness to testify twice to the same point, once yesterday or some other day in the past, and now while he is on the stand available to testify as to what the fact is irrespective of what

(Deposition of Wallace C. Hardie.)

he may have said previously was the fact and using words which he then used to do so. It is hearsay and the Court sustains the objection.

Mr. Crutcher: Next, your Honor, I proceed to Page 6, Line 13 of the deposition of the same witness. The question is, "Did you give any instructions to the electrician?" I offer the answer.

Mr. Detels: I object to the answer on the same grounds.

The Court: What lines, please?

Mr. Crutcher: This is between Lines 14 and 15, your Honor, on Page 6, commencing with the words, "Yes, I informed him."

The Court: The objection is sustained. The word "Yes" may remain. That is the statement of a fact [395] and is not hearsay. [396]

\* \* \*

Mr. Detels: As I recall, on Wednesday afternoon we concluded with Mr. Crutcher's direct examination in the testimony of the witness Rodney Palmer, and I did not have an opportunity to either conclude my cross-examination or to have read into the record the portions of Mr. Palmer's direct which Mr. Crutcher did not read, and I desire to do that at this time if that will suit the convenience of the Court. [397]

\* \* \*

Mr. Detels: Initially I wish to read some portions of the direct examination into the record under the provisions of Federal Rule 26 (C) (4),



which permits the introduction of portions of a deposition not read by the person offering it.

\* \* \*

(Thereupon, the reading of the deposition of Rodney Palmer was continued, as follows:)

### DEPOSITION OF RODNEY PALMER

“Q. Now, was there anything done on the 25th?

“A. At 8:00 o'clock in the morning of Thursday the 25th, we commenced clamming out. The longshore gang was on board to discharge the barley by use of a clam. [399]

“Q. Was that work under your supervision?

“A. Yes, it was.

“Q. How far down did they operate the clam bucket? That is, how much barley did they take out?

“A. They took out enough to get to the beams in the lower hold.

“Q. Now, at that time, did you enter the No. 1 lower 'tween deck?

“A. Yes, I did.

“Q. Would you describe the circumstances under which you went down there and the reason why you went down there?

“A. I went down to put the bridles onto the beam in the lower hold so that we could continue clamming to get the barley into the lower hold.

“Q. Was there any sign of fire at that time?”

Mr. Detels: And Mr. Crutcher's question at Line 17 of the same page:

(Deposition of Rodney Palmer.)

“Q. Will you please state whether you saw any sign of fire when you went down into No. 1 lower 'tween deck on that occasion?

“A. No, I didn't.” [400]

\* \* \*

Mr. Detels: Page 42, Line 20. This testimony also refers to the date August 25th.

“Q. Did you go down into the hold again at this time?

“A. At 2:15 I descended into the hold with a small hose to spray over the area.

“Q. What sort of equipment were you wearing at that time?

“A. I had put the oxygen breathing apparatus and mask back on again which consisted of goggles and air hose.”

Mr. Detels: Turning to Page 43, Line 21.

“Q. Did you direct water through the hold?

“A. There was limber holes in the coaming put in there to allow the grain to settle. I put my hand and the hose through there, directing it.”

Mr. Detels: And turning to Page 44, Line 19.

“Q. Were you able to see whether there was any flame or any light coming from the other side of the limber hole?

“A. No, I couldn't observe any flame or any other light in the other side.”

Mr. Detels: And now to take up the cross-examination, Page 121, Line 12.

(Deposition of Rodney Palmer.)

### Cross-Examination

“Q. Now, while the vessel was at Seattle and before the [401] bulk barley was partially unloaded, was any additional cargo loaded into No. 1 hold?

“A. Can I refresh my memory?

“Q. Certainly.”

Mr. Detels: The record indicates that the witness refers to the log book at this time.

The Court: And the log book has already been received in evidence as Respondent's Exhibit A-1.

Mr. Crutcher: That is correct.

“Q. You are referring to Respondent's Exhibit 'A.'

“A. Correct. Yes, they loaded cargo in No. 1 upper 'tween deck.

“Q. Do you know what that cargo was?

“A. It was just classified as general cargo.

“Q. Do you have anything available to you as a part of this deposition which would enable you to identify it more particularly than that?

“A. By using the cargo plan.

“Q. Would that assist you? (Handing same to the witness.)

“A. (Referring to Respondent's Exhibit 'B'): Evidently there is a discrepancy here between the log book and the cargo plan. The cargo plan being the final document after the vessel sailed, as to the disposition or whether the cargo had been moved—

(Deposition of Rodney Palmer.)

after they moved some of that cargo out they re-shifted it as shown on this [402] cargo plan."

Mr. Detels: And may the record show that the witness is referring to the cargo plan which has been offered here as Respondent's Exhibit A-5. Turning to Page 130—— [403]

\* \* \*

(Respondent's Exhibit No. A-5 for identification was admitted in evidence.) [404]

\* \* \*

Mr. Detels: Page 130, Line 19.

"Q. Now, did you make an inspection of the barley which was in proximity to the cargo lights in the other corners of the hatch opening after you went into the No. 1 lower hold?

"A. Yes, I did.

"Q. Can you describe the appearance of the barley in the [405] corners other than the port after corner?

"A. I would say it was the same as the rest of the cargo, the barley. It appeared to me in good shape."

Mr. Detels: Turning to Page 134, Line 21.

"Q. After the barley was partially discharged from the No 1 hold, did you inspect any cargo lights other than the cargo light at the port after corner in the center line section of the vessel?

"A. Checked all of the cargo lights in the lower hold.

"Q. What did you observe as far as the other cargo lights in the hold were concerned?

(Deposition of Rodney Palmer.)

“A. I think they were just in normal condition, just the same as they were when we started to load cargo.

“Q. No blackening?

“A. No.

“Q. Was there any grain adhering to any cargo light other than the one at the port after center line?

“A. No, they were all clear, free of grain.

“Q. Was there any melting or damage to the cable, as far as you could observe, on the other lights?

“A. No, there wasn’t.”

Mr. Detels: That concludes the cross-examination. [406]

\* \* \*

Mr. Crutcher: Referring back now to Page 40 of Mr. Palmer’s deposition, your Honor, and taking up where Mr. Detels left off with Line——

\* \* \*

### Direct Examination (Continued)

“Q. Now, did you succeed in removing the beams from the hatch into the No. 1 lower hold?

“A. Yes, I hooked the beams on and the long-shoremen moved the beams.

“Q. Were you wearing any sort of apparatus to protect yourself when you went down there? [408]

“A. An oxygen breathing apparatus to protect me against the CO<sub>2</sub>.



(Deposition of Rodney Palmer.)

"Q. Was that a mask?

"A. That is a mask that covers your whole face.

"Q. That is, goggles and mask?

"A. Built-in goggles.

"Q. When you got through, did you come back out of the hold?

"A. Yes, I returned back on deck at that time.

"Q. Now, did they continue digging down into the barley?

"A. Yes, they did.

"Q. This was with what?

"A. The clam." [409]

\* \* \*

"Q. How long did they continue discharging barley from the No. 1 lower hold?

"A. At 1:30 p.m. the odor of burning grain was coming out of the hold, which continued for another 20 minutes until 1:50, which burned and charred and discolored grain was coming out from beneath the after hatch coaming.

"Q. Did they stop discharging at 1:50?

"A. At 1:50 they stopped.

"Q. Did you go down into the hold again at this time?

"A. At 2:15 I descended into the hold with a small hose to spray over the area.

"Q. What sort of equipment were you wearing at that time?

"A. I had put the oxygen breathing apparatus and mask back on again which consisted of goggles and air hose."

(Deposition of Rodney Palmer.)

Mr. Crutcher: I'll go down to Line 6 on the next page.

"Q. Well, what was in the hose? Why were you taking the hose down? A. Water."

The Court: Can you repeat again for the Court's convenience the date on which this act or these acts are said to have taken place?

Mr. Crutcher: Your Honor, I think it will be agreed that we are referring to the early afternoon of [410] August 25th.

\* \* \*

"Q. Did you spray water in the No. 1 lower hold? A. Yes, I did.

"Q. Where did you direct the water?

"A. To the after end of the hatch, port side, where the crackling noise was coming from.

"Q. How deep down into the No. 1 lower hold were you at that time?

"A. Well, just approximately to the lower end of the coaming, maybe a foot below that, approximately 4 feet into the hatchway.

"Q. Were you surrounded by barley from that position? A. Yes, I was." [411]

\* \* \*

The Court: This is concerning your cross-libel for general average, is that right?

Mr. Crutcher: That's correct, your Honor.

PAUL LaMADE

called as a witness in behalf of respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Crutcher:

Q. Mr. LaMade, will you please state your full name and spell your last name for the reporter?

A. Paul LaMade, L-a-M-a-d-e.

\* \* \*

Q. (By Mr. Crutcher): Where do you reside, Mr. LaMade?      A. In Portland. [413]

Q. What is your occupation?

A. Electrician.

Q. How long have you been an electrician?

A. Thirty-one years.

Q. Who is your employer?

A. Electro-Mechanical Company.

Q. Is that a company in Portland?

A. In Portland, yes.

Q. And what is your position with them?

A. Well, now I'm an estimator and designer.

Q. In 1954 were you employed by Electro-Mechanical Company?      A. Yes.

Q. And in connection with that employment did you have occasion to supervise the installation of certain permanent cargo lights in the lower hold of the Oregon Mail?      A. Yes, I did.

Q. About when was that in 1954?

A. August, I believe.

Q. Might it have been in October?

(Testimony of Paul LaMade.)

A. It could have been, yes.

Q. Mr. LaMade, showing you a lamp which has previously been marked for identification in this proceeding as Respondent's Exhibit A-15, I will ask you to examine that.

Mr. Detels: If the Court please, I wish at [414] this time to object to this line of testimony as part of the respondent's case on the cross-libel. The lamp has been fully identified and testified to by numerous witnesses on both sides.

The Court: What have you to say, Mr. Crutcher?

Mr. Crutcher: May it please the Court, the whole purpose of calling this witness is to show that this installation was properly made. I don't expect it will take more than——

The Court: It is already in, you do not need to do anything else.

Mr. Crutcher: Yes, your Honor. I merely want him to identify it.

The Court: The objection to that extent is overruled.

Q. (By Mr. Crutcher): Mr. LaMade, will you state whether the light which is now shown to you is the same type light which was installed in the Oregon Mail lower number one hold in 1954?

A. Yes, it is.

Q. And is that the same type of cable which was used in that installation?

A. I don't believe that was the type of cable, but it was similar to that.

Q. Was it a standard marine cable? [415]

(Testimony of Paul LaMade.)

A. Yes, it is.

Q. What size light bulbs were used in that installation?

A. Well, at that time we were putting in 150 watt lamps.

Q. Were those reflector flood lamps?

A. Yes.

Q. Now, Mr. LaMade, did you personally take part in the installation of those lights?

A. I supervised the installation. [416]

\* \* \*

Q. (By Mr. Crutcher): Mr. LaMade, would you state whether you removed the old cargo lights at that time from that hold or whether they were left in place? [417]

A. No, we removed them.

Q. Did you test the circuits when you completed the installation?

A. Yes, we did.

Q. Would you tell the Court what that consisted of very briefly?

A. Well, firstly we check the circuit, naturally, to see if the lights are working, and we put an insulation test on it to see if they are what we call grounded or shorted to see that the circuit is clear, and if it's not we have to rectify it before we leave the job.

Q. Well, would you state to the Court whether when the installation was completed it was in working order?

A. Yes, it was. [418]

\* \* \*



## HARRY DENHAM JACOBS

called as a witness in behalf of respondent, being first duly sworn, was examined and testified as follows:

## Direct Examination

By Mr. Crutcher:

Q. Will you please state your full name, Mr. Jacobs and spell your last name for the reporter?

A. Harry Denham Jacobs. [419]

\* \* \*

Q. And are you an average adjuster with Horder, Jacobs & Speck? A. Yes, I am.

Q. In the course of your business as an average adjuster have you had occasion to deal with the loss and adjustments rising out of the damage to barley in the number one lower hold of the Oregon Mail in August, 1955? A. Yes, I have.

Q. And are you the one who is making the general average statement? A. I am. [420]

\* \* \*

(Respondent's Exhibit No. A-2 for identification was admitted in evidence.) [429]

\* \* \*

Respondent's Exhibits A-11, A-12, A-13, A-14, so far as I recall have not been offered and have not been admitted.

Mr. Crutcher: Your Honor—

The Court: They are all photographs, are they not?

Mr. Crutcher: Yes. It was stipulated between

Counsel that in lieu of calling the photographer with respect to those pictures that it would be stipulated that these are photographs taken in the after end of number one lower hold sometime after the damage——

The Court: Are Counsel agreed as to [430] whether they will be admitted or not?

Mr. Detels: I believe the date they were taken should be of record, your Honor. I have no objection if that is stated.

The Court: Will you state the date they were taken, or the approximate date?

Mr. Crutcher: Approximately August 26, 1955.

Mr. Detels: No objection.

The Court: Each of them is admitted, from A-11 to A-14, inclusive.

(Respondent's Exhibits Nos. A-11, A-12, A-13 and A-14 for identification were admitted in evidence.)

Mr. Crutcher: Your Honor, may I also state for purposes of the record, that is for purposes of identification, that A-11 is a photograph showing the light in the after port corner, a photograph previously identified by the witness Tomlin. I should say a light identified by the witness Tomlin.

A-12 is a picture of a light in the same relative position in the starboard corner of the after corner of the lower number one hold, and that A-14 and A-15 are pictures of——

The Court: A-15 is not involved in this. It is A-14. [431]

Mr. Crutcher: I beg the Court's pardon. A-13 and A-14 are pictures of unidentified portions of the deckhead aft of the hatch coaming in the number one lower hold aft.

\* \* \*

(An average agreement was marked Respondent's Exhibit No. A-16 for identification.)

\* \* \*

(Respondent's Exhibit No. A-16 for identification was admitted in evidence.) [432]

\* \* \*

The Court: I notice the paper is entitled Average Agreement. Do Counsel agree that it is in truth and fact a general average agreement?

Mr. Detels: Yes, your Honor.

Mr. Crutcher: Yes, your Honor.

The Clerk: Libelant's Exhibits Nos. 6 and 7.

(A bill of lading was marked Libelant's Exhibit No. 6 for identification.)

(An invoice was marked Libelant's Exhibit No. 7 for identification.) [433]

\* \* \*

(Libelant's Exhibits Nos. 6 and 7 for identification were admitted in evidence.)

Mr. Crutcher: Your Honor, in order that there won't be any misunderstanding, you had asked if the respondent rested.

The Court: That is exactly what the Court did and it is exactly what the Court meant. I wonder if there is anything else left that you have to offer.

Mr. Crutcher: You mean at any time until——

The Court: It does not make any difference. In the present status of the case. As far as the future status is concerned, we cannot foresee that.

Mr. Crutcher: No, I understand that. So far as the present status of the case and until the libelant rests its rebuttal case, we have none. At that time we have one expert witness whom we would like to call for brief testimony.

The Court: Concerning what?

Mr. Crutcher: Concerning the matter of flame, and the testimony by the witness Smith in yesterday's trial.

The Court: It seems to me you ought to call him to court now. What is there about any rebuttal that has been offered by the libelant that causes you now to need to introduce some sure rebuttal? [435]

Mr. Crutcher: May it please the Court, I believe it will be the position of the libelant that there is no positive evidence of flame because of course no one was down there. They have——

The Court: Many witnesses for the respondent have had their attention directed to that subject all the way through the respondent's case in chief.

Mr. Crutcher: Yes, but we saw no occasion to——

The Court: I do not see now, either. You will have to rest on the evidence already in.

Mr. Crutcher: May it please the Court, for the record I would like to state that I have present in court Mr. Francis Owens, who is a qualified cereal

chemist of long experience, and that I am prepared to offer his testimony.

The Court: Yesterday you indicated that the respondent's case in chief was complete with the exception of those depositions or something of that sort after you finished or in connection with the Court's inquiry regarding the use of live witnesses, and you then said something about after the libelant's case in chief you might want to introduce something further and the Court did not save any such opportunity.

Mr. Crutcher: If I said libelant's case in chief I misspoke myself. [436]

The Court: If I said it I did, too. I mean respondent's case in chief.

Mr. Crutcher: Well, I——

The Court: The respondent said in connection with its case in chief that the only thing it was reserving yesterday after they announced that they had no more live witnesses to call at that time was something about depositions.

Mr. Crutcher: If I may state my understanding, your Honor, it was that the libelant's witnesses in rebuttal were called out of order as a convenience to the witnesses. We made no objection, but I had not understood that the libelant rested its rebuttal case until after we had finished with our defense, and in all fairness to opposing Counsel I don't see how——

The Court: How many witnesses, how much time in respect to their testimony, do you wish to call?



Mr. Crutcher: I have one witness and I doubt if he'll be on the stand more than ten minutes.

The Court: You may have ten minutes with one more witness to introduce further evidence in the respondent's case in chief.

Mr. Detels: If the Court please——

The Court: Court is now at recess. I will hear you further after the recess. I will say this, [437] gentlemen: I have never seen a case so poorly tried from the standpoint of the order in which it is done as you two very experienced lawyers have tried this one.

(Short recess.)

Mr. Detels: If the Court please, I wish to make an urgent objection to the reopening of the respondent's case in chief with a live witness. We put in our rebuttal testimony with an expert witness yesterday afternoon under the clear understanding that all live witnesses to be called by the respondent had completed their testimony. Now, after our witness has testified from the stand the respondent is attempting to offer the testimony of another expert.

The Court: Was there any expert testimony offered by the respondent on this subject?

Mr. Detels: There was not, your Honor.

The Court: By live witnesses?

Mr. Detels: No, your Honor.

The Court: Mr. Crutcher, why did you permit opposing Counsel and the trial judge to understand that your live witness calling was completed yesterday? There were not any ifs or ands about it.

Mr. Crutcher: Your Honor, if that is accurate,

then I clearly am at fault. It was my understanding——

The Court: I am not saying what was said [438] or undertaken to be said, I am saying what the understanding was. That was my clear understanding. I had no condition at all on the subject of live witnesses. I was trying to get live witnesses finished so I could tell where we were with this case. It is certainly my understanding, whether I was justified by the words used by Counsel in so understanding or not, it was. I thought we were winding up everything yesterday so that all we would have to do would be to brush off these little written words details, particularly in these depositions comprising such great numbers.

Mr. Crutcher: I wish to apologize to the Court if I misunderstood, and I realize now that I did. It was my understanding that the Court wanted all of the live witnesses which were to precede Mr. Detels' evidence, that Mr. Detels was required to have his chemist testify yesterday out of order by reason of their personal business, and it was my understanding that our case in chief, in answer to the libelant's case, was interrupted for the purpose of permitting the libelant to offer its rebuttal evidence at that point and that all live witnesses which we were to offer in our case in chief were to be there at the same time that Mr. Detels' witnesses were. I did not understand that our rebuttal evidence was to come before Mr. Detels [439] had finished his case in chief, or I beg your pardon, his rebuttal case.

The Court: Your clients were sued, they were the respondents.

Mr. Crutcher: Yes, that's correct.

The Court: Everything that they ever expected to show on these pleadings that were in effect at the time the trial was started was supposed to be shown as a part of the respondent's case in chief.

Mr. Crutcher: That is correct, your Honor.

The Court: There cannot be any misunderstanding about that being the usual procedure.

Mr. Crutcher: Well, your Honor, as I understand the procedure, the libelant first shows, makes a prima facie case that we failed to deliver a certain quantity of barley. That was done in five minutes. The burden then shifted to us. We took up what was in fact the case in chief in this case by assuming the burden of showing that the loss was occasioned by reason of a fire. Then in response to that the libelant, of course, has to come back with rebuttal evidence.

Now, we offered in our case, of course, evidence of this fire. Mr. Detels then comes back in rebuttal with evidence that there wasn't a fire.

Now, I don't see how until that had been [440] done we could have an opportunity to offer our surrebuttal.

The Court: There is not any rhyme or reason to it no matter what we let ourselves get into about it, there is not any rhyme or reason about it and Counsel in the future must never permit themselves to pursue another case in this court like this. If you were just out of law school and had not had the

brilliant experience as a practitioner and a lawyer at this bar that you have had, what you say might touch a tender cord in the Court's heart or something like that, but it certainly does not with a man of the experience you have had and also Mr. Detels.

Everybody knows in this court and in this jurisdiction generally courts proceed with a trial on this fashion: Everything that the plaintiff has to sustain or has the burden of sustaining that he has alleged in his libel or complaint that is not admitted by the other side must be established once and for all in his case in chief, and after that whatever on the pleadings is something that the defendant must establish he must do it as a part of his case in chief, and then under our accepted procedure there is permitted to the suing party an opportunity for clarification by way of rebuttal testimony, and there may sometimes be permitted surrebuttal, but it is not as a matter of right at all. [441] Everybody in the world in the practice of law in this district and in this locality knows that, and I do not see how you as a practitioner of the experience you have had, Mr. Crutcher, could permit yourself to get into any such position as you are now taking.

Mr. Crutcher: Perhaps the Court——

The Court: I understand that you want to question some witness about ten minutes. Is that right?

Mr. Crutcher: That is correct, your Honor.

The Court: Where is your expert witness and what is his name?

Mr. Detels: Mr. Smith, your Honor.

The Court: Where is he?

Mr. Detels: He is as far as I know in his office at this time.

The Court: In this city?

Mr. Detels: Yes, your Honor.

The Court: Go to the phone and see if he is and have him come here immediately.

Mr. Detels: I will do that, your Honor, but I submit it is grossly prejudicial to reserve this kind of testimony until the opposition has put in its testimony on that point.

The Court: The Court notes the objection, and in view of all the circumstances we will proceed in the [442] manner I suggested at this time, with the admonition to Counsel that it will never be done again whenever I am presiding in this court.

Mr. Crutcher: May I make this one other remark, your Honor?

The Court: Yes.

Mr. Crutcher: I want it understood, the testimony of this witness is strictly surrebuttal, and I'm only asking leave of the Court to submit it when Mr. Detels has rested his rebuttal case. I don't even know that Mr. Detels has yet rested his rebuttal case.

Mr. Detels: I have rested.

The Court: Now, what is it you want to prove on this surrebuttal that you have not touched upon or have been called upon to touch upon in your case in chief?

Mr. Crutcher: To answer what his expert had to say, to show to this Court that in the opinion of a reliable and experienced chemist what his expert said simply isn't so.



The Court: I understood that his was purely rebuttal, and if you did not——

Mr. Crutcher: That is correct, your Honor. I——

The Court: He was rebutting something that came out in the respondent's case in chief. [443]

Mr. Crutcher: I also understood that.

The Court: The objection is sustained. We will not have any more evidence of that kind. It was up to the respondent to offer that as a part of respondent's case in chief.

Mr. Crutcher: May I make a remark for the record, your Honor?

The Court: You may have an exception to the Court's ruling and you may make an offer of proof in the record now.

Mr. Crutcher: Thank you, your Honor. I wish to make the following offer of proof, that the respondent American Mail Line has in court at the present time a witness named Francis Owens, who is a qualified cereal chemist; that he has made certain experiments relating to two-rowed barley such as was shipped on this occasion; that he used a lamp similar in type to that which has previously been identified as Respondent's Exhibit A-15 in connection with those experiments, and that he has made a test of the smoke which was coming from the smoke detector unit on August 23, 1955, from the Oregon Mail, and that based upon that test and based upon these experiments he arrived at a conclusion that there was a fire in the hold of the Oregon Mail and that this fire

involved both flame and glow necessarily. The respondent [444] rests, your Honor.

The Court: Will you pause for just a minute, Mr. Crutcher?

Mr. Crutcher: I beg your pardon, your Honor?

The Court: I want to hear your response. What you have said in the past does not take care of this offer. This is something new. This is an offer of proof. You may want to say something. What have you to say?

Mr. Detels: Well, I understood that the Court had ruled that it would not receive this testimony.

The Court: The Court made a ruling on what was then before the Court. It often occurs that when objecting Counsel hears the offer of proof, even though the Court had previously sustained the Counsel opposed to hearing the proof his objection to further opening up trial proceedings in the matter, that the offer of proof is considered after heard by the objecting Counsel to be innocuous and he does not object to its being admitted.

Mr. Detels: I renew my objection, your Honor.

The Court: What is it? You have heard the offer. I mean to say that since you have heard the offer does it purport to furnish evidence on any point that was not gone into as a part of the respondent's case in [445] chief and as to which respondent was not bound to go into as a part of its case in chief?

Mr. Detels: I submit that the offer shows that it was necessarily a part of respondent's case in chief, in that if the respondent had any testimony to offer

concerning experiments or tests made on the vessel or at some later time, it was under the obligation to put that proof in evidence before the close of its case in chief.

The Court: The Court sustains the objection, and one reason the Court does so is that we never would have heard the rebuttal proof including the expert witness if the Court had thought that it was being offered and being received as rebuttal of something that respondent had put out as evidence in the case in respondent's case in chief. You may proceed. I believe you said you rest.

Mr. Crutcher: The respondent rests, your Honor.

The Court: Do both sides finally rest?

Mr. Detels: Yes, your Honor.

\* \* \*

[Endorsed]: Filed August 15, 1958. [446]

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT  
COURT TO RECORD ON APPEAL

United States of America,  
Western District of Washington—ss:

I, John A. Burns, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit, and Designation of

Counsel I am transmitting herewith as the Apostles on Appeal herein to the United States Court of Appeals for the Ninth Circuit at San Francisco, the following original papers in the file dealing with the action, to wit:

1. Libel, filed August 22, 1956.
  6. Answer and Cross-Libel, filed Nov. 30, 1956.
  9. Answer to Cross-Libel, filed May 5, 1958.
  17. Pretrial Stipulation and Pretrial Order, filed May 6, 1958.
  35. Statement of Facts (Court Reporter's record of proceedings), Vol. 1, filed Aug. 15, 1958.
  36. Same, Vol. II, filed Aug. 15, 1958.
  37. Same, Vol. III, filed Aug. 15, 1958.
  28. Court Reporter's Transcript of Court's Oral Opinion, filed 5-21-58.
  29. Findings of Fact and Conclusions of Law, filed May 21, 1958.
  30. Decree, filed 5-21-58, for Libelant.
  32. Cost Bond on Appeal and Supersedeas Bond, filed July 24, 1958.
  33. Order Directing Clerk to Draw on Registry of Court for Money Deposited by Respondent, filed July 31, 1958.
  34. Notice of Appeal, filed Aug. 12, 1958.
  38. Designation of Record on Appeal, filed Aug. 15, 1958.
  39. Order Directing Clerk to Transmit Exhibits, filed 9-11-58.
- Libelant Exhibits 1 to 7, inclusive,  
Respondent Exhibits A-1 to A-16, inclusive.

I further certify that the following is a true and correct statement of all expenses, cost, fees and charges incurred in my office by or on behalf of the appellant for preparation of the record on appeal in this cause, to wit: Filing fee, Notice of Appeal, \$5.00; and that said amount has been paid to me on behalf of the appellant by its proctors.

Witness my hand and official seal at Seattle this 12th day of September, 1958.

[Seal]

JOHN A. BURNS,  
Clerk;

By /s/ TRUMAN EGGER,  
Chief Deputy.

---

[Endorsed]: No. 16186. United States Court of Appeals for the Ninth Circuit. American Mail Line, Ltd., a Corporation, Appellant, vs. Tokyo Marine & Fire Ins. Co., Ltd., a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed September 15, 1958.

Docketed: September 18, 1958.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.



United States Court of Appeals  
for the Ninth Circuit

No. 16186

AMERICAN MAIL LINE, LTD.,

Appellant,

vs.

TOKYO MARINE & FIRE INSURANCE CO.,  
LTD.,

Appellee.

STIPULATION OF ADDITIONAL MATTERS  
TO BE INCLUDED IN RECORD

It Is Stipulated between the parties that the following matters not otherwise shown in the record material to consideration of the appeal, designated by appellant, appear in the record in this cause before the United States District Court for the Western District of Washington:

1. On June 20, 1958, appellant paid \$2,616.74 into the registry of the District Court for the Western District of Washington, Northern Division, in partial satisfaction of the decree, and that amount has been withdrawn by appellee.
2. The further sum of \$5.84 has been deposited in partial satisfaction of the decree, this date.
3. The portion of testimony of Wallace C. Hardie which was admitted by the Court at pages 381, 382 of Statement of Facts, Volume II, Clerk's No. 36, lines 17 through 7, was as follows:

“He made no reference to the cluster lights. He didn’t designate what kind of lights.” (Deposition of Wallace C. Hardie, page 22, lines 2, 3.)

4. The testimony of Wallace C. Hardie which was offered by appellant at pages 393, 394, of Statement of Facts, Volume III, Clerk’s No. 37, was as follows:

“Q. Now, is this referring to the No. 1 hatch?

“A. No. 1 hatch forward. At that time I was engaged in another emergency deal in the after deck and was on my way to that when this fellow approached me on the deck about this matter; and I don’t know—he didn’t give me the full details of just what was wrong, and I says to him, ‘Have you put the switches on? Have you tried the switches?’ ”

The testimony of Wallace C. Hardie which was offered by appellant at page 395 of Statement of Facts, Volume III, Clerk’s No. 37, was as follows:

“Q. Did you give any instructions to the electrician?

“A. Yes, I informed him that there was some difficulty up there and to go up and see what he could do about it.”

It Is Further Stipulated that:

6. The general average statement was not completed at time of trial, and has not been completed as of the date of this stipulation.

7. The exhibits introduced at the trial may be considered in their original form, without the necessity for printing.

/s/ M. BAYARD CRUTCHER, of  
Proctors for Appellant;

/s/ MARTIN P. DETELS, JR., of  
Proctors for Appellee.

Receipt of copy acknowledged.

[Endorsed]: Filed September 23, 1958.

---

[Title of Court of Appeals and Cause.]

### STATEMENT OF POINTS

The points upon which appellant intends to rely on this appeal are as follows:

1. The court erred in holding that appellant was dilatory or negligent in the manner it adopted to put out the fire, and that appellant was thereby deprived of the benefits of the Fire Statute and the Carriage of Goods by Sea Act, § 4(2)(b).

2. The court erred in denying appellant its claim against appellee for general average and special charges arising out of the fire.

3. The court erred in refusing to admit the night mate Hardie's testimony that he instructed the ship's electrician to go to No. 1 resistor house on the

night of August 18, to see what he could do about the lights in No. 1 hold.

BOGLE, BOGLE & GATES,  
/s/ M. BAYARD CRUTCHER,  
Proctors for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed September 23, 1958.

---

[Title of Court of Appeals and Cause.]

### APPELLEE'S STATEMENT OF POINTS

Appellee does not appeal from the decree entered by the Court below, but states the following point on which it intends to rely on this appeal, in the event this Court overrules the District Court on the points set forth in Appellant's Statement of Points:

The District Court erred in finding and concluding that Appellant had sustained its burden of proving that the damage to the shipment of barley was caused by fire.

EVANS, McLAREN, LANE,  
POWELL & BEEKS,

/s/ W. T. BEEKS,

/s/ MARTIN P. DETELS, JR.,

Proctors for Appellee.

1111 Dexter Horton Building,  
Seattle 4, Washington.

Receipt of copy acknowledged.

[Endorsed]: Filed October 2, 1958.

No. 16186

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**United States Court of Appeals**  
**For the Ninth Circuit**

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AMERICAN MAIL LINE, LTD., a Corporation, *Appellant*,  
vs.

TOKYO MARINE & FIRE INS. CO., LTD., a Corporation,  
*Appellee*.

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

---

**APPELLANT'S BRIEF**

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BOGLE, BOGLE & GATES  
M. BAYARD CRUTCHER  
DONALD McMULLEN  
*Proctors for Appellant.*

603 Central Building,  
Seattle 4, Washington.

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**United States Court of Appeals**  
**For the Ninth Circuit**

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AMERICAN MAIL LINE, LTD., a Corporation, *Appellant*,  
vs.

TOKYO MARINE & FIRE INS. Co., LTD., a Corporation,  
*Appellee*.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

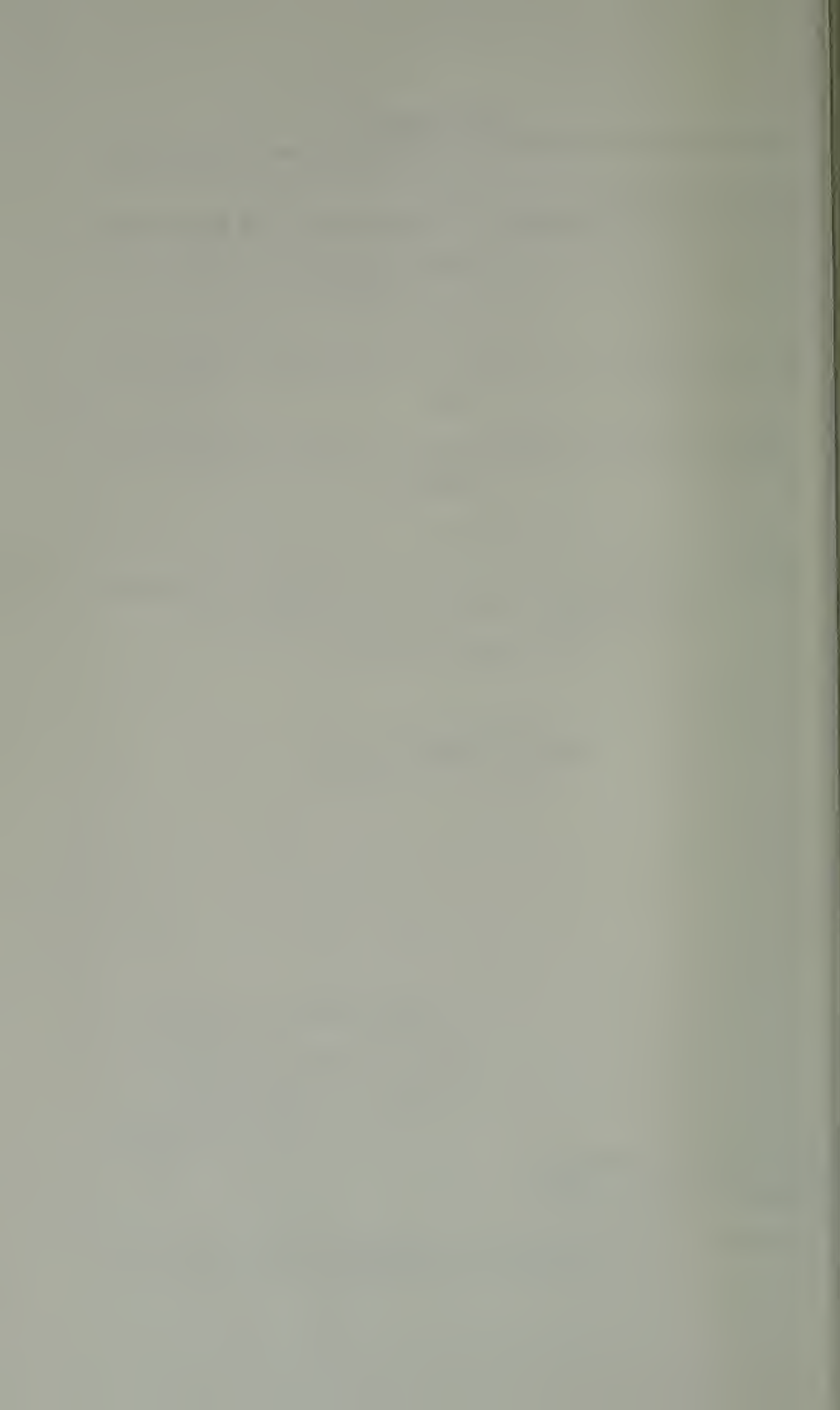
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**APPELLANT'S BRIEF**

---

BOGLE, BOGLE & GATES  
M. BAYARD CRUTCHER  
DONALD McMULLEN  
*Proctors for Appellant.*

603 Central Building,  
Seattle 4, Washington.



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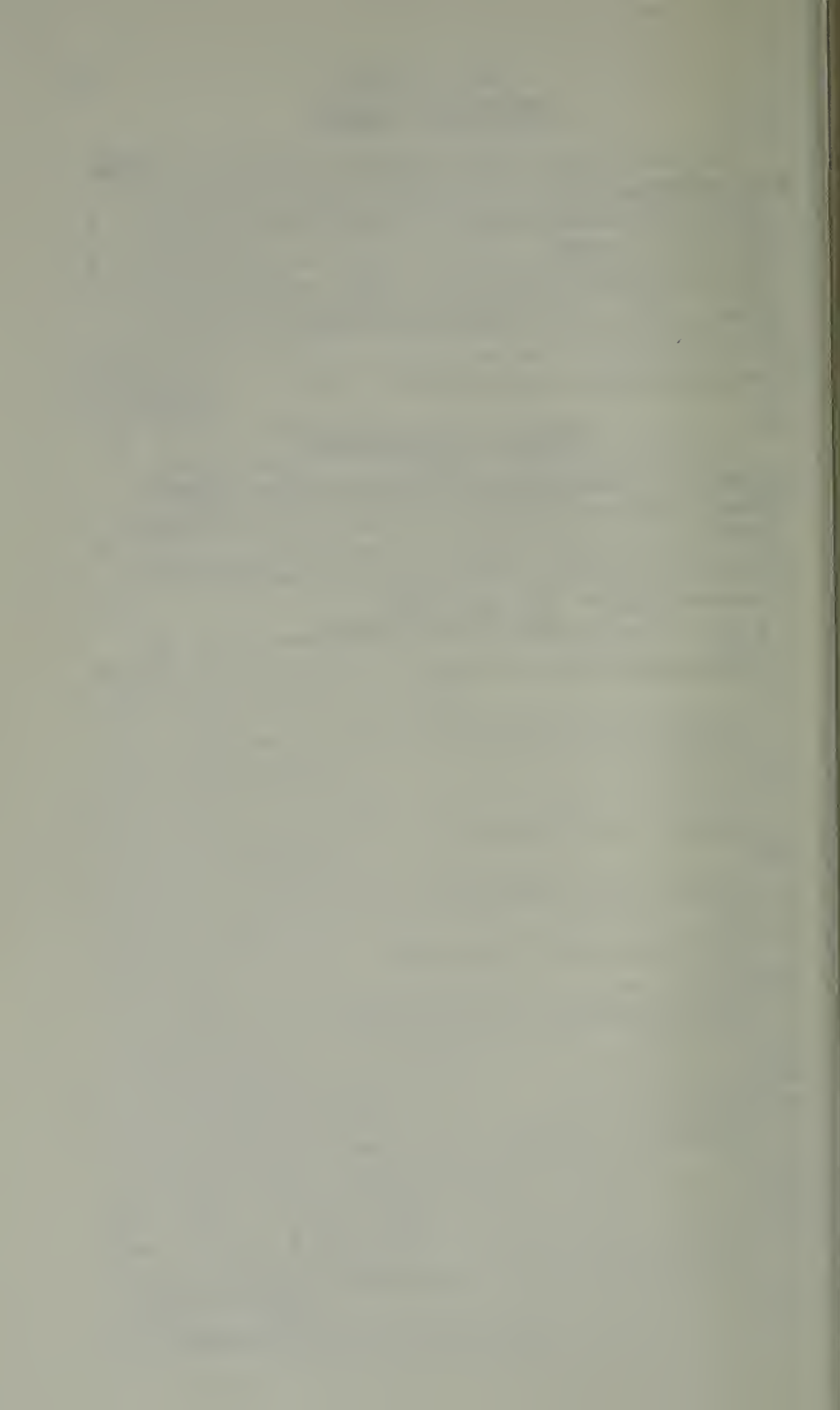


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# United States Court of Appeals

## For the Ninth Circuit

AMERICAN MAIL LINE, LTD., a Corporation, <i>Appellant,</i>	}	No. 16186
vs.		
TOKYO MARINE & FIRE INS. CO., LTD., a Corporation, <i>Appellee.</i>		

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

### APPELLANT'S BRIEF

#### JURISDICTION

This is a cargo fire case.

Libelant cargo insurer sued the respondent shipowner in admiralty in the United States District Court for the Western District of Washington, claiming for the value of the non-delivered cargo — 823,026 lbs. of barley (Libel, Tr. 3-6). Respondent answered, pleading statutory exemption from liability for fire, and cross-libeled for libelant's share of the general average sacrifice (Cross-libel, Tr. 12-14).

The barley was being carried under an ocean bill of lading, and libelant was subrogated to the rights of the cargo owner (Findings III, V, VI, Tr. 24, 26). The suit was therefore properly brought in admiralty. *The Belfast* (1869) 7 Wall. 624, 19 L.ed. 266.

Likewise, the claim for general average contribution was properly brought in admiralty. *Star of Hope*, 9 Wall. 203, and *The Jason*, 225 U.S. 32.

The District Court had jurisdiction of the libel and cross-libel. 28 U.S.C. § 1333.

Final decree—denying the shipowner the benefit of the Fire Statute and holding that libellant did not have to pay its share of general average—was entered and filed on May 21, 1958 (Decree, Tr. 35-37). Respondent thereafter filed a supersedeas bond and its notice of appeal on August 12, 1958, less than 90 days after the decree (Tr. 37-40).

This Court has jurisdiction of the appeal. 28 U.S.C. §§ 1291, 2107.

## STATEMENT OF THE CASE

This suit concerns a fire in a shipment of barley being carried in the steamship *Oregon Mail* in August, 1955. The fire originated in heat from a cargo hold light accidentally turned on. It was detected and extinguished at Seattle, with damage to less than 15% of the shipment. The cargo insurer sued the carrier-shipowner for the damage to the barley. Respondent shipowner claimed exoneration under the Fire Statute and cross-libeled the cargo insurer for its share of the general average.

The trial court, the Honorable John C. Bowen, exonerated the shipowner of any fault in causing the fire, but held nevertheless that it did not use the judgment of "any prudent person" in the way it confirmed the existence of the fire and put it out. The court gave libellant its damages in full and denied the cross-libel without explanation.

Issues raised on appeal by the shipowner are:

1. Shipowner was entitled to exoneration under the Fire Statute and Carriage of Goods by Sea Act, under the facts found.

2. There was no proof or basis for court's ruling about how the fire could have been confirmed and extinguished merely by shooting CO<sub>2</sub> into the hold, by "any prudent person."

3. Court erred in not making any finding that the steps which appellant's officers took to extinguish fire were necessary to save both cargo and ship, and that general average sacrifice came within terms of Jason clause.

## Facts About the Ship

The SS OREGON MAIL is a C-3 cargo freighter, of familiar design—three holds forward of the house and



two aft. General features and dimensions are shown in capacity plan, Exhibit A-3. There is no issue of seaworthiness, and the features of the ship having to do with the fire can be pointed out briefly.

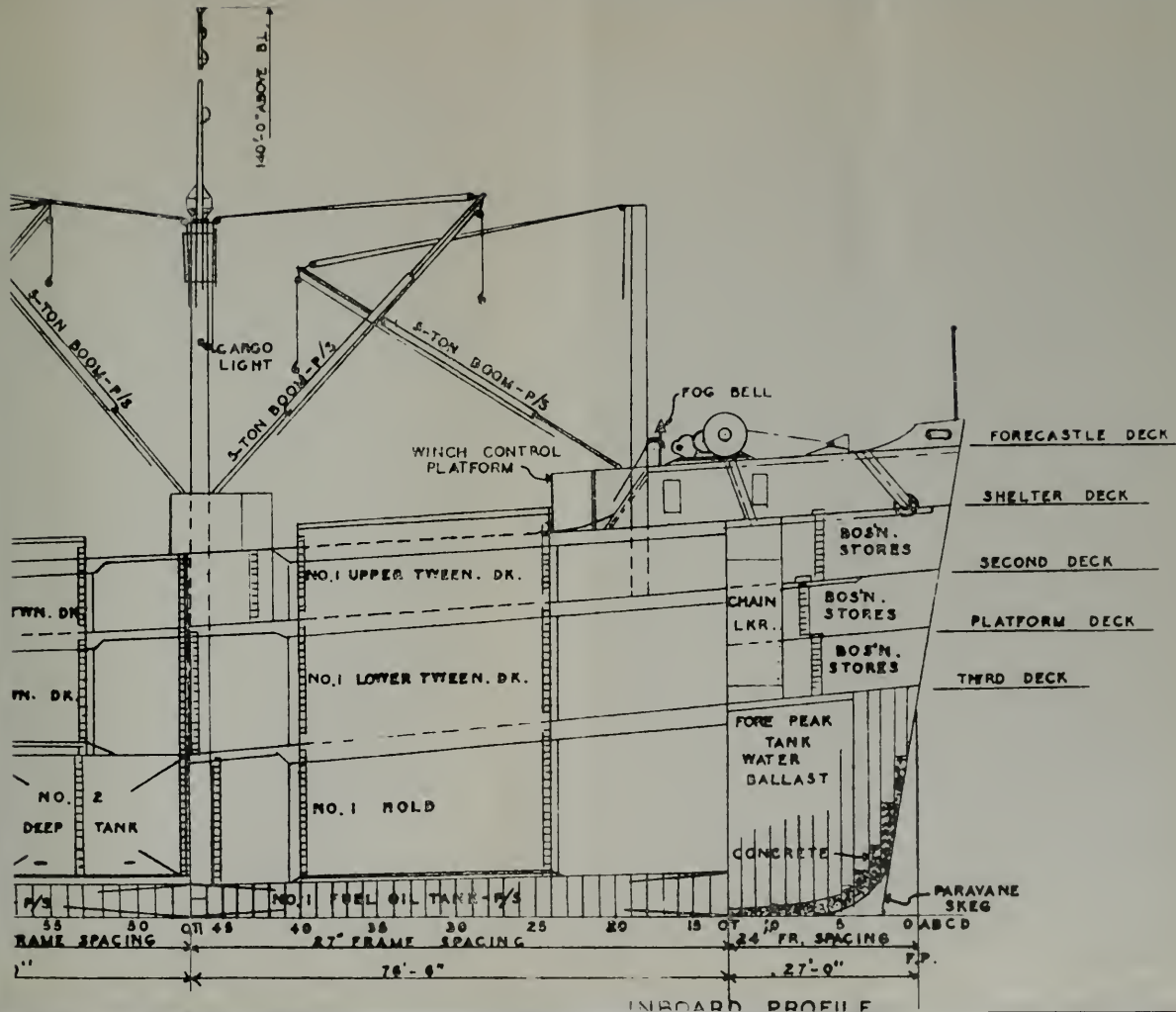
*No. 1 Hold* is at the bow, behind the forepeak (Ex. A-4). A scale diagram taken from the ship plan is annexed to aid the court in understanding the position of the barley and the fire.

*Permanent metal cargo light fixtures* are attached behind the after hatch coaming in No. 1 lower hold, and elsewhere in No. 1 hold. Photographs of these two in the after trunk, taken just after the fire, are Exhibits A-11 (port side of trunk) and A-12 (starboard side of the trunk) (Tr. 220). These lights were installed in the fall of 1954, complete with new circuits of standard marine cable, and the circuits were tested (Tr. 286, 287).

*Switch and fuse panel* for the lights in No. 1 hold and deck lights at No. 1 hatch is in a resistor house between hatches No. 1 and No. 2. The resistor house is secured by a locked screen panel (Ex. A-7). The mates and electricians carry keys (Tr. 133, 134). The switch panel itself has a double door—one opens to expose only the switches (Tr. 65, Exhibits A-8, A-6), the other, shaped like a picture frame, and locked, opens independently and exposes the fuse panels on both sides of the switches (Ex. 1). There are separate fuses for the light circuits in each compartment in No. 1 hold (Tr. 164).

*King posts* between hatches No. 1 and No. 2, standing about 70 feet high, serve to ventilate all compartments in No. 1 hold (Tr. 49, 80, 81, illustrated, Ex. A-2).

The OREGON MAIL was equipped with a *Rich Audio*





*fire detection system*. This sucks air samples from each compartment to a cabinet in the wheelhouse. The captured air passes through a lighted flare and is then exhausted outside. Smoke will set off an alarm buzzer. The system had been tested yearly (Tr. 46, 70, 71, 107-110).

The ship was also fitted with a *carbon dioxide smothering system*, including diffusers in No. 1 lower hold (Tr. 87, 88).

### **Barley Loaded August 17**

Voyage 33 of the OREGON MAIL began uneventfully at Portland, Oregon, on August 14, 1955 (Tr. 129, Ex. A-1).

August 17 the vessel shifted across the Columbia River to a grain elevator at Vancouver, Washington, to load libellant's barley (Tr. 130, 135, 238, Ex. A-1). Chief Mate Palmer and marine surveyor Bennett inspected No. 1 lower hold before loading began for a period of about 15 minutes, and found it in good order (Tr. 130-133, 160, 170-173). The grain was poured into the holds through spouts and there were no workmen inside (Tr. 133).

Shortly after loading started the Chief Mate ordered that the fuses be pulled for light circuits in the grain holds, No. 1 and No. 5 (Tr. 64, 65, 134, 161, log entry, A-1, 1000 August 17). An electrician then pulled the fuses for the light circuits in all three compartments of No. 1 hold (Tr. 134, 161, 164).

The practice of pulling fuses to prevent mates from accidentally switching on lights in grain holds was customary (Tr. 44). It is considered good seamanship (Tr. 232, 233).

During this day — the 17th — No. 1 lower hold was filled with barley, and the bottom third of No. 1 lower tween deck as well (Tr. 134, 140). This and loading of No. 5 with barley also were the only cargo operations at Vancouver (Tr. 134, 135, Ex. A-1).

### **Lumber Loaded Over Barley**

The ship left Vancouver that evening and proceeded down river to Longview, where it made fast at a lumber dock about 11 P.M., August 17 (Tr. 135, Ex. A-1). The next morning the Chief Mate went into No. 1 lower tween deck. He had the barley dunnaged over in preparation for loading lumber in that hold (Tr. 135, 136). Loading commenced at 9:25 A.M., and longshoremen continued stowing lumber over the barley in No. 1 lower tween deck all that day and through the night, up to 4:30 the morning of the next day, the 19th (Tr. 264-266, Ex. A-1, August 18, 19).

### **No. 1 Lights "Fixed"**

Meantime, at 4 o'clock on the afternoon of the 18th, W. C. Hardie, a relief night mate, went on duty on the OREGON MAIL (Tr. 136, 259, 266, Ex. A-1). One of his duties was to turn on deck and hold lights as required (Tr. 137, 271). He had been night mate previously, the first watch of the 18th (Ex. A-1). He knew that there was barley in No. 1 lower hold (Tr. 268) and he knew the practice of pulling fuses from light circuits in grain holds (Tr. 271, 272).

Hardie states that he turned on the ship's lights on the evening of August 18. At some time, not specified, a stevedore foreman approached him about the lights at



No. 1 (Tr. 259, 260, 270, 274, 304). Hardie called out the ship's electrician to "fix it" (Tr. 263, 269).

Questions Hardie asked the foreman and instructions Hardie gave the electrician about the lights at No. 1 were considered hearsay by the trial court, and excluded (Tr. 260, 261, 263, 264, 304).

However this may be, it is clear that the fuses were snapped back into the light circuits for all three levels of No. 1 hold some time before the 20th (Tr. 146, 147).

When the longshoremen finished loading lumber in No. 1 lower tween deck in the early morning of August 19, they covered the tween deck and quit work (Tr. 266, 267, Ex. A-1). Hardie turned off the deck lights and portable cluster lights. He did not know whether any lights were on in the lower holds (Tr. 267, 268, 269).

At 8 A.M. another gang came aboard, covered the main deck hatch at No. 1, and began loading timbers on deck (Tr. 137, Ex. A-1). This was finished at noon, and the OREGON MAIL departed Longview bound for Vancouver, British Columbia (Tr. 138, Ex. A-1).

### **Odor or Smoke Saturday Night**

The OREGON MAIL arrived at Vancouver, B.C., at noon on Saturday, August 20. Loadings included sacks of asbestos in No. 1 lower tween deck, finished at 3 P.M., and then sacks of flour in No. 1 upper tween deck, evidently completed that afternoon (Tr. 138, 139, Ex. A-1).

At 8 P.M., two hours after he went on watch, Second Officer Tomlin detected a slight smoke or suspicious odor from the detector in the pilot house (Tr. 46). Neither the Master nor the Chief Mate could see any

smoke, but they agree there was a peculiar odor (Tr. 75, 143, 145, Ex. A-1, August 20).

A prompt search of the ship began.

Neither the Chief Officer nor the Second Officer could find any sign of fire (Tr. 47, 52, 143-145). However, Palmer did discover during his search that the fuses for the No. 1 light panel had been clipped back into place (Tr. 146, 147). He removed them and reported this promptly to the Captain, Wilmarth (Tr. 162).

The Chief Officer was able to enter every cargo compartment except No. 1 lower hold (Tr. 143). Suspicion narrowed to No. 1, at least, because the fire dampers on the No. 1 king posts were then shut, as a precaution (Tr. 47). The Master ordered a close watch on the smoke detector (Tr. 48, 76, 78, 111).

Neither the Captain nor the Chief Mate could identify the odor (Tr. 77, 78, 114). Some time that night or the next morning they tried heating barley on the galley stove to see if that was the odor. They still could not decide whether that was it (Tr. 111, 112).

### **Vessel Searched at Seattle**

Meantime, the OREGON MAIL finished at Vancouver, and headed for Seattle (Tr. 142). It arrived at Fisher's Dock, Seattle, at 7 o'clock Sunday morning, August 21 (Tr. 145, 146).

A close watch was being kept on the detector (Tr. 146). The odor seemed more pronounced (Tr. 77, 78). A further search of the ship was made; no smoke was present in No. 1 tween decks (Tr. 48, 49, 151). At 9

A.M., when the No. 1 king post was opened for observation, Palmer detected smoke from the port post, he believes (Tr. 146, 150). He reported this to Wilmarth. The Captain himself could not see any smoke (Tr. 77). However, he then called Capt. Greenwood, Port Captain for American Mail Line, at his home, and informed him they had indications of a possible fire in No. 1 lower hold (Tr. 77, 79, 116, 150).

Captain Greenwood in turn called James Gow, an experienced marine surveyor (Tr. 175, 176, 178, 211, 222). Greenwood, Gow and Mr. Skewes, Gow's assistant, all arrived at the ship between 11 and 12 that morning (Tr. 77, 176, 179, Ex. A-1).

A further search for signs of fire had been made meantime (Tr. 151). Greenwood questioned the Master and Chief Officer. They reported no smoke as yet, and Greenwood learned about the fuses (Tr. 223, 229, 230). Greenwood made a personal inspection with Gow, Skewes and another surveyor named Johnson (Ex. A-1).

They found no visible sign of smoke or fire (Tr. 151, Ex. A-1).

Gow himself could not find sufficient evidence to decide that there was a fire. He knew about the search throughout the vessel (Tr. 213). There was a "foreign odor" from the detector; it had "smoke taint" but it was not at that time heavily pronounced (Tr. 176, 177). There was no visible smoke in the detector (Tr. 214). There was a slight indication that the odor was more pronounced from No. 1 hold, "but it wasn't definitely determined" (Tr. 178, 212, 214). The same odor was

present in the exhaust vent from the No. 1 king posts (Tr. 214).

Gow could not see any smoke from the king post (Tr. 181).

An attempt was made to take temperatures in No. 1 lower hold, through the sounding pipes. No abnormal temperatures were found (Tr. 79, 119).

### **Conclusion Reached Sunday**

At this point, on Sunday afternoon, Gow was not convinced there was any fire (Tr. 180). Greenwood was concerned (Tr. 233). He had never smelled an odor like it (Tr. 234). He was not certain one way or the other (Tr. 234, 235).

“The conclusion that was reached by all concerned was that it would take watching, and accordingly the master was instructed to watch that particular area very closely and report immediately if anything should develop.” (Tr. 235)

Thereafter a continuous watch was maintained on the detector, directed to No. 1 hold (Tr. 78, 80, 152). The vessel was shifted to American Mail Line's home terminal, Pier 88, Seattle, in the early evening, on schedule (Tr. 80, Ex. A-1). The Captain and a mate remained on board for any emergency (Tr. 80). Cargo operations continued (Tr. 117). The watch on the detector continued through the night, and there were frequent inspections of the entire ship, particularly No. 1 hold (Tr. 152, Ex. A-1).

### **Smoke Confirmed — Conference**

The next morning at 8:30, Monday, August 22, surveyors came aboard to re-examine. Some time after 9



o'clock, Captain Wilmarth, Captain Greenwood and Mr. Gow spotted what appeared to be very light smoke in the detector, from No. 1 lower hold (Tr. 85, 152-154, 181, Ex. A-1). They checked all other areas (Tr. 152-154) and Captain Wilmarth could see light smoke from the No. 1 port king post "if the sun was just right" (Tr. 85). Gow could not recall seeing this (Tr. 181).

Mr. Gow, Captain Wilmarth, Captain Greenwood, Captain Swanson, the operating manager, Captain Brady, another marine surveyor and Mr. Palmer, the chief officer, then conferred. They concluded that there was a fire in No. 1 hold, and decided to take out the cargo over the barley (Tr. 81-83, 153, 154, 182, 224, 226, 227). Reasons given for that decision are discussed in the argument, pp. 26-28.

### **Fire Fighting**

Captain Wilmarth ordered that No. 1 hold be discharged (Tr. 81, 83), and discharge was continuous from 1 o'clock Monday afternoon (Tr. 81, 117, 118) until the entire surface of the barley in No. 1 lower tween deck was cleared away at 2:05 on Wednesday morning (Tr. 87, Ex. A-1), as fast as they could go (Tr. 86).

As a precaution, the vessel stopped all other cargo activities Monday afternoon except loading of perishable refrigerated items (Tr. 83, 117, 118, Ex. A-1). A chief from the Seattle Fire Department came aboard that night to inspect (Ex. A-1).

Careful watch on the detector continued throughout the course of the fire (Ex. A-1). By Tuesday, August 23, the smoke from the detector was noticeably thicker



(Tr. 193). Officers from the Seattle Fire Department and Coast Guard came aboard to check conditions (Tr. 84, Ex. A-1).

As soon as the cargo over the barley was out, the barley was blanketed with tarpaulins and pontoons and the stevedores were cleared from the ship (Tr. 83, Ex. A-1, 0205 August 24). Captain Wilmarth then began releasing carbon dioxide into No. 1 lower hold (Tr. 86, 87). During Wednesday and on Thursday morning the ship's officers put over 9,000 pounds of carbon dioxide through the smothering line into No. 1 lower hold (Tr. 87-89, Ex. A-1). By Thursday morning there was no more smoke, no more odor from the detector (Tr. 90).

### **Fire Area Uncovered**

On Thursday morning the stevedores commenced clamming out the barley in the lower tween deck (Tr. 83, 278). By noon the barley in the square of the lower hold had been dug into. The Chief Officer went down with oxygen breathing apparatus and heard a crackling sound aft of the coaming (Tr. 282, 283, 284, 195, 208).

Light smoke was coming from that area (Tr. 195). Palmer could not see any flames (Tr. 279). More carbon dioxide was discharged over the fire area at 2 P.M. (Tr. 283, Ex. A-1). There was the odor of burning grain (Tr. 283, Ex. A-1). When the burned barley began to come out from underneath the after coaming a bucket full was hauled out to be examined. It crackled, and the bucket was too hot to touch (Tr. 92, 226, Ex. A-1).

### **Water Applied**

On Gow's advice, Palmer took down a hose and sprayed water through limber holes onto the area be-

hind the coaming for about 15 minutes. He still wore oxygen breathing equipment (Tr. 196, 279, 283, 284, Ex. A-1).

### **Damage to Barley and Ship**

Discharge of burned and discolored barley from the after trunk continued from about 2 P.M. on Thursday, the 25th, until 10:30 the next morning, August 26th (Tr. 90, 91, Ex. A-1). Gow estimates that 50,000 lbs. were actually burned—734,490 lbs. in all were discharged at Pier 88 and subsequently sold as charred or smoke-tainted, although much sound barley was intermingled with the bad (Tr. 53, 187, 188, 199, 200, Ex. A-10). Barley except in the port after corner appeared to be undamaged (Tr. 281).

Estimates of the fire damage area by those who inspected it were quite consistent—one area ran 4 to 8 feet back from the hatch coaming, 5 to 10 feet in from the port beam and possibly 3 feet deep (Tr. 56, 57, 99, 100, 155, 156, 197, 198). This area was marked in red by Captain Wilmarth on Ex. A-4 (Tr. 97). The heaviest burning was there, in the vicinity of the port cargo light pictured in Ex. A-11 (Tr. 55, 102, 192, 193). There was another charred area, much less severe, under the starboard cargo light pictured in Ex. A-12 (Tr. 57, 199).

The deckhead in the after trunk was charred and burned (Tr. 56, 91, 99, 102, 226). The light cable on the port side was also severely burned (Tr. 55, 61, 99, 157). It cracked when bent by hand (Tr. 61). The cargo lights themselves were blackened and caked with burned barley (Tr. 55, 156).

### **Existence of Fire Disputed**

Wilmarth, Gow and Tomlin all concluded from their examination that there had been a fire in the after trunk of No. 1 lower hold (Tr. 63, 102, 200).

No witness who was on the OREGON MAIL during this time expressed any other view. However, a chemist-witness for libelant, Mr. Smith, claimed to reproduce very similar barley char in an oven set at 600 degrees for only 20 minutes (Tr. 248, 249, Ex. 4). He examined about 6 kernels of char taken from a sample of the burned cargo and concluded that the char never burned at over 800 degrees, judging from its shine and the absence of visible ash (Tr. 241, 250, 251). From this he implied that there would have been no "fire" giving a flame or glow (Tr. 244, 245).

### **Fire Fighting Ends**

To complete the ship's story, it should be reported also that at 5:15 P.M. on Thursday the hold was certified gas free. As of 7 P.M. the last evidence of fire was put out (Tr. 103, Ex. A-1). The hold was inspected Friday morning by a Coast Guard inspector and others, who confirmed that there was no further fire (Tr. 103, Ex. A-1). The barley was trimmed, and the stevedores commenced reloading the lumber cargo into No. 1 hold at 5 P.M. on Friday afternoon, August 26 (Ex. A-1).

### **Fire Damage Summarized**

The results of this accident moneywise are not in dispute.

Barley not delivered under the bill of lading — that is, both burned and good barley removed from No. 1

lower tween deck and No. 1 lower hold during August 22-25, amounted to 823,026 lbs. The agreed value of this quantity is \$23,301.43 (Tr. 18). Salvage proceeds amounted to \$15,368.89 (Tr. 19). Agreed special charges applicable to salvage are \$1,490.84 (Finding XV, Tr. 31). In addition, the general average adjuster holds a general average deposit of \$3,540.00 from the salvage proceeds pursuant to the average agreement between American Mail Line and consignee (Tr. 19, Ex. A-16). The balance of salvage proceeds has been remitted to libellant with interest (Tr. 19, 303).

In addition, the shipowner sustained losses in fighting the fire. Some of the expenses are listed in Exhibit A-10. A general average was declared, as provided in American Mail Line's bill of lading (Tr. 10, 11, 15, Ex. 6, clause 10). The general average statement has not been completed (Tr. 304).

### **Court's Findings**

The court found that the fire was started by negligent burning of an electric cargo light (Tr. 21, Finding VII, Tr. 27). It further found that the starting of the fire was by negligence of crew members, in respect to which the respondent was not in privity (Tr. 21, Finding VII, Tr. 27). It found that there was a fire in the barley from the time smoke was first indicated on August 20 (Tr. 21, 22, Finding VIII, Tr. 27).

The court found that respondent delayed for an unreasonably long time in applying CO<sub>2</sub>: the first use of it, on August 24, "accomplished the results which any prudent person would have in the exercise of due and ordinary care accomplished by similar methods within



the first twenty-four hours of the ship's arrival in Seattle." Captain Greenwood, and through him American Mail Line, was negligent for not employing carbon dioxide to fight the fire each and every day after August 21 (Tr. 22; see also Finding XIII, Tr. 30, 31).

The court awarded libelant the full damages prayed, and without assigning any reason denied respondent's claim for contribution to general average (Tr. 22, 23, Conclusion VI, VII, Tr. 34).

### Decree

Decree was entered for libelant in the amount of \$13,972.54 with interest from the date the remaining barley was delivered in Japan, September 16, 1955, and costs. Cross-libel for general average contribution was dismissed with prejudice<sup>1</sup> (Tr. 36, 37).

### SPECIFICATION OF ERRORS

1. Conclusion that shipowner is liable for damages resulting from fire caused by negligence of its employees, without its privity, ignored terms and intention of the Fire Statute, and was error.

2. The basic finding that respondent delayed for an unreasonably long time in applying CO<sub>2</sub> to No. 1 lower hold is unsupported by the evidence, and clearly erroneous (Oral Opinion, Tr. 22, incorporated in Findings XVI, Tr. 32, Finding XIII, Tr. 30, Conclusion III, Tr. 33).

3. The trial court erred in failing to make any findings whether the means and precautions which the ship

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<sup>1</sup>Other items of interest awarded in the decree were by stipulation of counsel. They are not involved in this appeal.



took to fight the fire and make sure it was out were proper general average items under the Jason clause (compare Oral Opinion, Tr. 23, incorporated in Findings, Tr. 32, and Conclusion VII, Tr. 34).

4. The trial court erred in failing to charge libelant with special charges necessarily incurred to salvage the barley discharged at Seattle (Finding XV, Tr. 31).

### ARGUMENT

1. Conclusion that while shipowner was not negligent in causing the fire, it was nevertheless liable for the damage, because of means it took to confirm existence of fire and to fight it, is wrong. Fire Statute and exemption from liability for fire in Carriage of Goods by Sea Act mean same thing. *Automobile Insurance Co. v. United Fruit Company*, 2 Cir., 224 F.2d 72, 75; *A/S J. Ludwig Mowinckels Rederi v. Accinanto, Limited*, 4 Cir., 199 F.2d 134, 143. Shipowner is liable only for fire caused by his neglect. Statute "makes no other exception from the complete immunity granted." *Earle & Stoddardt v. Ellerman's Wilson Line*, 287 U.S. 420, 425.
2. Finding that shipowner delayed for unreasonably long time in applying carbon dioxide to fire area is based on this speculation:  
 Use of CO<sub>2</sub> on August 24 "accomplished the results which any prudent person would have in the exercise of due and ordinary care accomplished by similar methods within the first twenty-four hours of the ship's arrival in Seattle" (Tr. 22, Finding XIII, Tr. 30). Therefore — although this is only implied — CO<sub>2</sub> should have been applied to No. 1 lower hold before the cargo above it was discharged.  
 Libelant had burden of proving this. *Automobile In-*

*urance Co. v. United Fruit Company*, 2 Cir., 224 F.2d 72, 75, and numerous other cases so hold. Libelant offered no evidence to prove that surmise—indeed, it contended there was no fire. Court does not mention this.

Court made no reference to uncontroverted fact that ship's officers, marine surveyors and appellant's port captain made thorough search of ship, and that none of them concluded there was a fire until August 22. It is presumed that the master's decision was properly made. *Star of Hope*, 9 Wall. 203.

Court does not mention uncontroverted fact that when existence of a fire was confirmed, officers and surveyors held meeting to decide best means of fighting it. Nor does court give any credit to their judgment.

Court made no reference to uncontroverted statement of opinion by Gow, that it was necessary to discharge cargo before applying CO<sub>2</sub>, or reasons: perilous for longshoremen to work in a hold with CO<sub>2</sub>; and CO<sub>2</sub> alone was not enough to put out a smouldering fire.

Court does not mention undisputed fact that No. 1 hold was discharged with utmost dispatch.

Court makes no mention that it was water, not carbon dioxide, which was necessary to cool off fire area.

Court could not have taken judicial notice of scientific fact or experience to justify its speculation—they confirm Gow's opinion.

Court nowhere mentions that ship's method of fighting the fire saved ship and other cargo, and all but small part of libelant's barley.

Court omits to mention or give any weight to fact that libelant failed to call any of actual witnesses who might have justified its speculation—surveyors, two

fire chiefs, several Coast Guard officers who were on board during search and time fire being fought.

3. Court ignored appellant's claim for general average (Oral Opinion, Tr. 23, Finding XIV, Tr. 31, and Conclusion VII, Tr. 34, are the only references to it).

Findings make no mention of contract between parties for general average, and appellee's average agreement. Undisputed evidence was that expenses and losses in the nature of general average were incurred, result of which was that master of *Oregon Mail* saved ship, rest of the cargo, and more than 88% of the value of libelant's cargo. All elements of general average were present. *The Jason*, 225 U.S. 32, 57. Court does not mention this.

Whether cargo was discharged before or after fire put out, same elements of expense were present, due to fire caused without design or neglect of shipowner.

Court does not mention this unless it meant to imply that *Oregon Mail* should have put to sea without inspecting fire area, which seems fantastic. In any event, court erred in not making relevant finding.

- 4.. Claim for special charges is governed by decision of first and second specifications of error. No separate argument necessary.

# 1. The Trial Court's Conclusions Ignore the Language and Intent of the Fire Statute.

The trial court found that the starting of this fire and its continuing to burn until the OREGON MAIL reached Seattle was caused by the negligence of crew members, without the privity of appellant shipowner (Oral Opinion, Tr. 21, incorporated in Findings, XVI, Tr. 32).

It further found that appellant, through its port cap-

tain, was negligent in not then applying carbon dioxide on each day after August 21—presumably until the early morning of August 24, when the carbon dioxide was released (Oral Opinion, Tr. 22, Finding X, XVI, Tr. 29, 32). This of course had to do with the time it took to confirm that there actually was a fire, and the time it took to discharge the cargo stowed over the barley in No. 1 hold.

This latter finding is based upon an unfounded speculation, as pointed out in the next section of this argument. But suppose there was some proper basis for the speculation? How does that warrant the conclusion that the Fire Statute can now be ignored? (Conclusion III, Tr. 33).

Revised Statutes §4282, 46 U.S.C. §182, states:

*“Loss by fire.* No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.”

The bill of lading in this case (Ex. 6) is also subject to the Carriage of Goods by Sea Act, 46 U.S.C. § 1304 (2) (b), which provides that neither carrier nor ship shall be responsible for damage arising or resulting from—

“(b) Fire, unless caused by actual fault or privity of the carrier.”

Fortunately, the exemptions under both acts are considered identical as to a shipowner-carrier. *Automobile*



*Insurance Co. v. United Fruit Company*, 2 Cir., 224 F.2d 72, 75; *A/S J. Ludwig Mowinckles Rederi v. Accinanto, Ltd.*, 4 Cir., 199 F.2d 134, 143. The semantic differences between "design and neglect" and "actual fault or privity" can therefore be ignored.

Mr. Justice Brandeis, speaking for the court in *Earle & Stoddardt v. Ellerman's Wilson Line*, 287 U.S. 420, states this proposition in direct and forcible terms:

"First. The fire statute, in terms, relieves the owners from liability 'unless such fire is caused by the design or neglect of such owner.' The statute makes no other exception from the complete immunity granted." (425)

By what warrant does the trial court choose to ignore the plain language of the statute and the equally plain language of the Supreme Court? It does not say.

Certainly the Fire Statute is not to be strictly construed against appellant. *Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo*, 320 U.S. 249, 254, overrules this contention precisely, pointing out the intended purpose of the statute to relieve American ocean carriers of the burden of fire insurance.

Certainly the statute was not intended to provide for hair-splitting about damage done after the fire started and before it was found, and after it was found and before it could be brought under control, and while it was being extinguished. This would bring absurd results, as pointed out in *American Tobacco Co. v. The Katingo Hadjipatera*, SD N.Y., 81 F.Supp. 438, 446, affirmed 2 Cir., 194 F.2d 449. To paraphrase from *Consumers Import Co. v. Kawasaki K.K. Kaisha*, 2 Cir., 133 F.2d 781,



affirmed *sub nom. Consumers Import Co. v. Kabushiki K.K. Zosenjo*, 320 U.S. 249, "we must not clutch at such straws to find liability, or construe the Fire Statute grudgingly" (133 F.2d 785).

The conclusion by the trial court below ignores the plain language of the Fire Statute. It is wrong. Appellant was entitled to exoneration.

## **2. There Was No Evidence to Justify Court's Speculation What "Any Prudent Person" Would Do.**

We contend that there was no evidence to support the court's finding that "any prudent person" would have put out this fire in 24 hours by simply shooting CO<sub>2</sub> into the barley hold. This was no more than speculation, and clearly erroneous.

Our contention gives proper basis for review of the finding. *States Steamship Company v. United States*, 9 Cir., 259 F.2d 458, 460, referring to the rule in *McAllister v. United States*, 348 U.S. 19, 20.

## **Burden of Proof Was on Libellant**

Before examining the evidence, however, it should be pointed out that this is a case under the Fire Statute, R.S. 4282, 46 U.S.C. § 182.

It has been uniformly held that the Fire Statute places the burden on cargo interests to establish that the fire was caused by the negligence of the shipowner. *Automobile Insurance Co. v. United Fruit Company*, 2 Cir., 224 F.2d 72, 75, *supra*, is one of many such decisions.

Of course here there is no claim that the fire was caused by the personal neglect of American Mail Line

(Tr. 27). Rather, the trial court reads into the statute a qualification, "or unless such fire is not promptly put out" through the neglect of the shipowner.

This is a questionable liberty with the words adopted by Congress. However, it follows the reasoning of *Great Atlantic & Pacific Tea Co. v. Brasileiro*, 2 Cir., 159 F.2d 661, 665, and our attack now is not on this construction of the act, but rather upon the complete failure by libelant to sustain its burden of proof.

### **Libelant Offered No Evidence**

At all times during the trial libelant maintained that there had been no fire. It denied the allegation of fire damage in its answer to cross-libel (Par. I (1), Tr. 15). It frequently objected to the witnesses describing this as a "fire" (*e.g.*, Tr. 49, 100, 143). The only witness it called was the chemist Smith, to say there was no fire (Tr. 239 *et seq.*).

Certainly, therefore, the trial court did not draw from libelant's evidence its conclusion that "any prudent person" would have shot CO<sub>2</sub> into the barley hold on August 21 or August 22.

### **No Witness Agreed with Mr. Prudent Person**

Hindsight comes easy in a courtroom, long after the crisis is over and done with. This is illustrated by the question the trial judge put to Mr. Gow:

"THE COURT: Is it or is it not the fact as you now know the fact to be that it was at all times a fire from and after the 20th day of August, 1955?

A. Yes, sir." (Tr. 212)

The truth is, however, that none of the witnesses came to that conclusion on Sunday, August 21, the day the

court said that "any prudent person" would have reached for the CO<sub>2</sub>.

The recollections of the witnesses who were on the ship on the night of August 20 and during August 21 are set out in Appendix B, pp. 36-37 of this brief. It is obvious that all of them were acutely aware of the possibility of a fire, probably in No. 1 lower hold. But the important thing is that skilled, intelligent observers, with this serious responsibility facing them, did not draw the conclusion which comes so easy now.

Surveyor James Gow has been called in some 25 to 30 ship fire cases (Tr. 176). He has had 36 years of experience as a professional marine surveyor (Tr. 175). Greenwood called him to come to the OREGON MAIL on the morning it arrived in Seattle, August 21, to determine if there was a fire (Tr. 178, 211, 222). He went, and searched, smelled, looked (Tr. 176, 177, 178, 179, 212, 213, Ex. A-1, 1155 August 21).

"THE COURT: (to MR. Gow) It is a question of what you determined. Did you find a fire on that ship on the 21st of August, is what Counsel wants to know.

A. No, sir." (Tr. 180)

No one else on board determined that there was a fire, that day.

The master, Captain Wilmarth, who was aware of developments from the first report of "suspicious odor" on the previous night, could not satisfy himself whether there was a fire (Tr. 75-79, 162). He was a licensed master with much experience (Tr. 73, 74).

Chief Officer Palmer, Surveyor Skewes, Surveyor

Johnson and Port Captain Greenwood all looked. Nowhere is there evidence that they or anyone else could confirm existence of a fire—and the evidence in the log book is the opposite:

“No visible sign of smoke or fire. It was recommended that a continuous watch be maintained on the smoke detector unit. This was complied with.”  
(Ex. A-1, 1255 August 21)

How—except by hindsight—can it be said that “any prudent person” would then start fighting a fire that no one actually on board could confirm existed?

At this point it is in order to point out that Captain Wilmarth was in charge of the ship. He—not the trial court—was responsible for its safety. He sought competent help, secured it, and made a decision. The words of Mr. Justice Clifford in *Star of Hope*, 9 Wall. 203, are appropriate. There also the ship had a cargo fire. It was off the coast of Patagonia, and the master had to make a decision whether to attempt a stranding or attempt to enter a bay without a pilot.

“Owners of vessels are under obligation to employ masters of reasonable skill and judgment in the performance of their duties, but they do not contract that they shall possess such qualities in an extraordinary degree, nor that they shall do in any given emergency what, after the event, others may think would have been best. \* \* \* if he is a competent master, if an emergency actually existed calling for a decision whether such sacrifice was required, and if he appears to have arrived at his conclusion with due deliberation, by a fair exercise of his own skill and judgment with no unreasonable timidity, and with an honest intent to do



his duty, *it must be presumed, in the absence of proof to the contrary, that his decision was wisely and properly made.*" 9 Wall 230, 231. (Italics supplied)

### **Decision to Discharge Based on Expert Opinion**

There was no visible change in conditions during the night of August 21/22 (Tr. 152; Ex. A-1).

On Monday morning, August 22, Gow and others did observe faint smoke in the detector (Tr. 85, 152-154, 181). The master could see light smoke from the port king post "if the sun was just right" (Tr. 85). The officers, surveyors and company officials met, concluded there was a fire in No. 1 hold, and decided to take out the cargo over the barley (Tr. 81-83, 153, 154, 182, 224, 226, 227).

Is there evidence to support the finding that "any prudent person" would now flood the No. 1 lower hold with CO<sub>2</sub>? No. The method which Gow recommended was carefully reasoned. It safeguarded the stevedores, insured that the fire would actually be put out, and succeeded.

(A) The known conditions in the ship were: there was now definite evidence of a smouldering grain fire in No. 1 lower hold. The barley was overstowed with lumber, a flammable cargo, and other cargo in the lower and upper tween decks, amounting to over 400 tons.<sup>2</sup> There were fuel oil tanks behind the after bulkhead in No. 1 lower hold. The ship and cargo were now definitely in danger (Tr. 104, 105).

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<sup>2</sup>This particular figure does not appear in record. See summary of cargo tonnage removed to get at fire area, Ex. A-1, August 26, and computation in Appendix D.



In this situation, the men who met—the master, the chief officer, surveyors Gow and Brady, the port captain and the operating manager for American Mail Line—were responsible for protecting millions of dollars worth of ship, cargo and pier, and also for safeguarding the men who would have to work in No. 1 hold.

Nothing in the findings mentions these facts.

(B) Carbon dioxide is a useful weapon in fighting a fire (Tr. 183) but it is dangerous to humans (Tr. 184) and it is not fully effective in extinguishing a smouldering fire.

The testimony explaining why American Mail Line started taking cargo out of No. 1 hold instead of flooding it with carbon dioxide gas, is as follows:

“Q. Now, Mr. Gow, why wasn’t the carbon dioxide used until the morning of August the 24th?

A. The reason for that was that the fire was in the—we had determined that the fire was coming from—the smoke was coming from the lower hold, therefore we considered—I considered that the fire was in the number one lower hold. There was cargo in the ’tween deck, which didn’t give you an opportunity for access to the number one lower hold. Therefore, that cargo had to be removed. Carbon dioxide is a heavier-than-air gas and it shuts off the oxygen, and at a certain percentage it won’t sustain fire, fire can’t be sustained under it and even human life can’t. It affects a person’s breathing and you suffocate. For that reason you couldn’t put longshoremen into the hold to take the cargo out of the ’tween deck with a possibility of the gas leaking, because when the gas comes from—when carbon dioxide is set off and the gas comes in, it comes in under a turbulence, there’s a heavy pres-

sure under it, and you could get gas up in the 'tween deck and it would be dangerous to put men in there, and you couldn't put men in there without a gas mask.

Q. In your opinion as a professional surveyor was it necessary to remove this cargo in the upper 'tween deck of the number one hold?

A. Very definitely." (Tr. 184)

This is nowhere disputed.

The fact is also that the barley had to be cooled before the fire could be fully extinguished. Carbon dioxide has only a slight cooling effect.

"It's not a heavily cooling effect, but it shuts off the oxygen to whatever is burning, and it settles over there and as it diffuses, then if oxygen gets to it, why that glowing mass will come right back up again either to a heavier glow or to an actual fire, but you have reduced the carbon dioxide which was holding that down to smother it." (Tr. 209)

This is why the fire area had to be sprayed with water when it was exposed (Tr. 196, 279, 283, 284, Ex. A-1), after it had been smothered in CO<sub>2</sub> for more than 35 hours.<sup>3</sup>

There is no evidence whatever disputing these very important facts.<sup>4</sup>

<sup>3</sup>First release of CO<sub>2</sub> was 800 lbs. at 0305 on August 24. Last release was 800 lbs. plus one portable bottle at 1330 on August 25. Chief Officer Palmer entered with water hose at 1415, August 25. Ex. A-1, Tr. 88, 89, 279, 283, 284. The trial court's idea that anyone could have put out fire with CO<sub>2</sub> alone, within 24 hours, Tr. 22, without even blanket-ing the surface of the barley, has no support whatever in the record.

<sup>4</sup>Certainly the court did not take judicial notice of common matters of science which in some way contradicted Gow's testimony. See Appendix C, Scientific Data Regarding Carbon Dioxide.

(C) Gow's method succeeded. American Mail Line saved over 88% of the value of libelant's barley.<sup>5</sup> There was only superficial damage to one hold of the ship. All the rest of the cargo was saved (Ex. A-1).

The trial court makes no mention of these facts.

### **Libelant Did Not Call Available Witnesses**

Finally, it is necessary to call attention again to libelant's burden of proof.

The "any prudent person" must have had some qualified witness who would back up his idea that all you had to do was shoot carbon dioxide into the hold.

Why did libelant fail to call any of the other surveyors who were aboard?

Why did libelant fail to call Fire Chief Kennedy, who was on board the same day that the OREGON MAIL started discharging cargo from No. 1, and again on the 23rd? (Ex. A-1, 2230 August 22, 1930 August 23).

Why did libelant fail to call Fire Chief Graham, who came aboard to inspect the next morning, and also on the 25th? (Ex. A-1, 0905 August 23, 1610 August 25).

Why did libelant fail to call the officers of the United States Coast Guard who were aboard on the 23rd and the 25th? (Ex. A-1, 0920 August 23, 1430 August 25).

Why did libelant fail to call any one?

The evident inference is that they would have agreed with Gow and not with the ethereal "any prudent person."

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<sup>5</sup>This figure as such is not in the record. For computation see Appendix D.

The trial court makes no mention of the fact that no one disputed Gow's opinion. Indeed, it makes no mention of Gow's opinion!

### 3. Court Should Have Required Libelant to Pay Its Share of General Average.

The court erred in summarily dismissing American Mail Line's claim against libelant for contribution in general average (par. 3, Tr. 37) without making any findings whatever on the essential facts of the claim.

General average clause in the bill of lading provides in part:

"In the event of accident, danger, damage or disaster, before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the carrier is not responsible, by statute, contract, or otherwise, the goods, shippers, consignees, or owners of the goods shall contribute with the carrier in General Average to the payment of any sacrifices, losses, or expenses of a General Average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods. \* \* \* " (Ex. 6, cl. 10)

This is the accepted "Jason clause" presently used. See Lowndes & Rudolf's General Average and the York-Antwerp Rules (8th ed., 1955), 288. It is valid. *The Jason*, 225 U.S. 32, 55, 56. It is necessary to prevent the confusion and chaos in general average adjustment which followed in the wake of *The Irrawaddy*, 171 U.S. 187, and *The Strathdon*, 2 Cir., 101 Fed. 600.

The facts which give rise to this argument are simple and undisputed. American Mail Line claimed for con-



tribution in general average (Tr. 10-13). Tokyo Marine & Fire Insurance Co., Ltd., approved the general average agreement signed by the cargo owner (Tr. 15, 16, Ex. A-16). Horder, Jacobs & Speck, Inc., the average adjusters, hold \$3,540 of barley salvage proceeds as a general average deposit (Tr. 19) and \$1,490.84 for expenses of salvaging barley for libelant's interest. The general average statement has not been completed, and only prospective liability for such contribution as is properly stated is now in issue (Finding XIV, Tr. 31, Tr. 288, 304, Ex. A-16).

The trial court found that the starting of the fire resulted from negligent acts on the part of members of the ship's crew, in respect to which the respondent as the vessel's owner and operator was not in privity (Tr. 21, incorporated in the Findings, XVI, Tr. 32).

The evidence clearly showed that there were expenses and losses in the nature of general average (Tr. 185-187, Ex. A-10). Vessel and cargo were in peril (Tr. 104, 105). It was the master's decision to commence discharging the cargo above the barley, and to stop loading at all other holds (Tr. 91, 118). The ship did put out the fire, and it saved over 88% of libelant's cargo.<sup>6</sup>

All of the elements of general average are here, "the essence of which is that extraordinary sacrifices made and expenses incurred for the common benefit and safety are to be borne proportionately by all who are interested." *The Jason*, 225 U.S. 32, *supra*, at 57.

The court made no finding that these expenses and the loss to the shipowner were unnecessary.

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<sup>6</sup>This figure is explained in Appendix D.



It stated that Mr. "any prudent person" would flood the No. 1 hold with carbon dioxide without waiting to clear away the overstowed cargo. No witness said so. But what if he had?

What would libelant's argument be if the OREGON MAIL had set out to sea without discharging the overstowed cargo and the barley in No. 1 lower tween deck to make dead sure the fire was out, and the ship had then burned and gone to the bottom?

The speculation that Mr. "any prudent person" would be smarter than Wilmarth or Gow or Greenwood, and start shooting carbon dioxide before a fire was confirmed, has nothing to do with this issue. The only evidence in the case is that it was necessary to spend the time and money to dig out over 800 tons<sup>7</sup> of cargo in No. 1 hold, non-stop (Tr. 86), delay virtually all other cargo operations from August 22 to August 26 (Tr. 91, 103-105) and use 46 200-lb. bottles of carbon dioxide to fight the fire (Tr. 88, 89).

There is no testimony that such sacrifices would have been unnecessary if Mr. "any prudent person" had come on board on August 20, armed with all the hindsight in our transcript. Much less August 21, or August 22, when the existence of fire was confirmed (Tr. 182).

Since it was proved that the parties contracted for contribution in general average under the terms of the Jason clause (Ex. 6, clause 10), a general average was declared (Finding XIV, Tr. 31), and libelant gave a general average guarantee (Ex. A-16), and since it was

---

<sup>7</sup> This particular figure does not appear in record. For explanation see Appendix D.

also proved that the fire was started without the design or neglect of respondent shipowner (Tr. 21, Finding XVI, Tr. 32), and that by reason of the existence of that fire sacrifices were made to save the venture, and that the master did succeed in extinguishing the fire and saving libellant's cargo, the cross-libel for general average contribution should be allowed.

#### 4. Special Charges

Expenses paid to salvage the damaged portion of libellant's barley were \$1,490.84. It is agreed that this amount was reasonable and proper. That sum is retained by appellant from the salvage proceeds remitted to appellee, under terms of the bill of lading (Finding XV, Tr. 31, 32, Ex. 6, Cl. 10). The trial court adjudged in effect that the shipowner is to pay these expenses (Conclusion V, VI, Tr. 34).

It is submitted that if the damage to appellee's cargo was caused without the design or neglect of appellant—as determined under the first and second specifications of error—then appellee cargo insurer is obliged to pay the agreed and reasonable cost of salvaging its cargo.

### CONCLUSION

Appellant submits that there was no lawful basis for the court's finding that although the fire in the OREGON MAIL was caused without its design or neglect, it was deprived of the statutory exemption from liability because its officers did not shoot CO<sub>2</sub> into the hold before a fire had even been confirmed, in disregard of human life and the known limitations of CO<sub>2</sub>.

The decree awarding appellee damages, and denying

appellant its claim for contribution in general average and expenses of salvaging appellee's damaged cargo, should be reversed.

Respectfully submitted,

BOGLE, BOGLE & GATES

M. BAYARD CRUTCHER

DONALD McMULLEN

*Proctors for Appellant.*

## APPENDIX A — TABLE OF EXHIBITS

No.	Description	Identified	Offered	Received or rejected
1	photo, No. 1 switch panel, both doors opened .....	71, 72	72	admitted, 72
2	sample of charred barley from OREGON MAIL.....	206, 239, 240	241	Admitted 241
3	Tempil Chart .....	241, 242	242	Admitted 244
4	sample of charred barley from experiment .....	248	250	Admitted 250
5	section of cable from experiment .....	253	255	rejected, 255
6	bill of lading.....	290	290	Admitted 290
7	copy of invoice.....	290	290	Admitted 290
A-1	rough deck log book.....	45, 82	82	admitted, 82
A-2	photo, forward deck of OREGON MAIL .....	80, 81	288	Admitted 288
A-3	blueprint, capacity and deck plan for OREGON MAIL.....	94	95	admitted, 95
A-4	copy, part of A-3.....	95	95	admitted, 95
A-5	final stowage plan.....	140	281	Admitted 281
A-6	photo, switch panel, showing switches .....	147	148	Admitted 148
A-7	photo, resistor house screening and lock .....	147	148	Admitted 148
A-8	photo, switch panel, closed.....	147	148	Admitted 148
A-9	loading survey report, Bennett	171	-----	-----
10	Gow survey report, commencing from Int. No. 15, Page 2, par. 6 to end.....	190, 191	192	Admitted 192
11	photo of port cargo light in after trunk, from No. 1 LH.....	219, 220, 289	289	Admitted 289
12	photo of starboard cargo light in after trunk, opposite light shown in A-11.....	219, 220, 289	289	Admitted 289
13	photo of deckhead, aft of hatch, No. 1 LH.....	219, 220, 290	289	Admitted 289
14	Another view of deckhead, aft of hatch, No. 1 LH.....	219, 220, 290	289	Admitted 289
15	Cargo light .....	237, 286	238	Admitted 238
16	Average agreement between parties .....	18, 290	290	Admitted 290

# APPENDIX B — TESTIMONY ABOUT SMOKE

<i>Witness</i>	<i>Time</i>	<i>Recollection When Testifying</i>	<i>Log Book Record (Ex. A-1)</i>
2/O Tomlin	August 20 1800	slight smoke from detector No. 1 (Tr. 46, 47)	1800 2nd Mate informed master & CH mate of a suspicious odor coming from the smoke detector. Checked same and no visible signs of smoke showing. CH mate and 2nd Mate checked all cargo spaces except No. 1 L/H which is plugged with grain. Nothing unusual found.—RP.
Capt. Wilmarth	same	no smoke visible (Tr. 75-78, 110) no smoke reported (Tr. 75, 76, 106)	same
C/O Palmer	same	smoke from detector reported (Tr. 142) could not find any smoke or sign of fire (Tr. 143, 145)	same
C/O Palmer	August 21 0900	greyish smoke from King post (Tr. 150)	"0900 suspicious odor still present in smoke detector unit, but no visible signs of smoke. Again checked all available cargo spaces, except No. 1 L/H for same odor, but nothing was found, checked exhaust vent unit from No. 1 aft king post, and found the same odor, notified the master, who called Capt. Greenwood AML Port Captain." (Ex. A-1) Rodney Palmer.
Capt. Wilmarth	same	no smoke visible (Tr. 77)	Surveyors Skewes. Johnson also aboard,



no smoke visible (Tr. 177, 178)

after the inspection

1600-1800

2400

August 22 (Monday)

0100

0000/0800

0830

0900

Capt. Wilmarth

morning

"a wisp of smoke" in detector  
(Tr. 85)

James Gow

morning

detectible smoke in the detector  
(Tr. 181)

"It was recommended that a continuous watch be maintained on the smoke detector unit. This was complied with." (Ex. A-1, continuing above entry). R.P.

"Continuous watch maintained on smoke detector apparatus, thereafter checked every  $\frac{1}{2}$  hour. Frequent inspection of entire ship made."

"All in order."

"Smoke detectors checked every  $\frac{1}{2}$  hour."

"frequent rounds made about ship,"

"all in order."

"Alexander Gow men aboard to check smoke detector."

"Mr. James Gow, Capt. Brady, surveyor, Capt. Swanson, Capt. Greenwood and Master inspected smoke detector unit which was concentrated on air from No. 1 L/H what appeared to be smoke was observed to be coming from this area, all other units were tried separately, but no signs of smoke from these areas. It was then agreed to commence discharging lumber from No. 1 L/TD at 1300 so grain could be obs No. 1 L/H. RP."

## APPENDIX C

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### SCIENTIFIC DATA REGARDING CARBON DIOXIDE

This case comes to the Court of Appeals in an odd posture. There was only witness who discussed the limitations of carbon dioxide in fighting this fire, James C. Gow. He explained that  $\text{CO}_2$  was dangerous to human life, and not an effective coolant, and that in his opinion it was necessary to discharge the cargo over the barley before shooting the gas into No. 1 lower hold. See pages 27-29 of this brief.

Appellee offered no evidence to contradict this. It was appellee's burden to prove negligence, and appellant had no way of knowing that the trial court would either ignore Mr. Gow, or disbelieve him. The oral opinion clearly shows that the court gave no weight whatever to Gow's testimony (Tr. 22).

The only ground which can be imagined for such action by a court of law is that it took judicial notice of some matter of common scientific knowledge *sub judice*, so to speak. But scientific sources seem to clearly substantiate Mr. Gow's testimony.

#### 1. Danger to Human Life

*NFPA Handbook of Fire Protection* (11th ed., 1954), p. 355, states that "increased carbon dioxide and combined effects of carbon monoxide plus carbon dioxide" is one of the main causes of fire deaths.

It is suffocating, if heavily concentrated (p. 1180).

The tragic suffocation of three longshoremen in a hold of the motorship ASA LOTHROP at Tacoma, Washington, on December 29, 1949, is a vivid reminder of

what CO<sub>2</sub> can do. This accident was the subject of proceeding before a Board of Investigation designated by the Commandant, United States Coast Guard, in the matter of inquiry into the facts surrounding the death of Albert J. Nysen, Del J. Thiel and William Flannery, longshoremen aboard the motor vessel ASA LOTHROP, at Tacoma, Washington, on 29 December, 1949, while engaged in handling cargo, conducted January 11 to 19, 1950, at Coast Guard Headquarters, Seattle. It was likewise the subject of three civil suits against Alaska Ship Lines, Inc., in the Western District of Washington, Southern Division, Cause Numbers 7608, 7609, 7610.

## **2. Incomplete Effect on Smouldering Fires**

*NFPA Handbook of Fire Protection, supra*, Ch. 62, deals with carbon dioxide extinguishing systems.

“Carbon dioxide fire extinguishing systems are effective primarily because they reduce the oxygen content of the air to a point where it will no longer support combustion. Under suitable conditions of control and application a cooling effect is also realized. \* \* \*

“A reduction of the oxygen content of the air from the normal 21 per cent to 15 per cent will extinguish most fires in spaces which do not include materials that produce glowing embers or smouldering fire. The amount of oxygen necessary to support combustion varies with different materials (see Table 1189). Reduction to considerably less than 15 per cent is required in some cases. To extinguish fires completely in areas or spaces containing materials which will produce glowing embers or smouldering fires, or fires involving highly heated

metal containers, it is necessary to reduce the oxygen content to 6 per cent or less and to maintain that dilution for more than the normal brief period. Otherwise, a reflash may occur." (1179)

Layman, *Attacking and Extinguishing Interior Fires* (National Fire Protection Association, Boston, 1952), explains the fire chemistry which accounts for this limitation on the use of carbon dioxide:

"Flame production ceases when the oxygen content of the surrounding atmosphere decreases to approximately 15 per cent. Fires involving gases and liquids are extinguished completely when flame production ceases but this is not true in the burning of solid combustibles. Decomposition begins once a solid fuel is heated sufficiently and the volatile products of the fuel are released in gaseous form. Flame results from the burning of the gases and vapors after they have obtained a proper air mixture. Although flame production ceases when the oxygen content of the surrounding atmosphere falls below 15 per cent, smouldering burning of the solid residue will continue in an atmosphere containing a much lower percentage of oxygen." p. 7.

## APPENDIX D

## EXPLANATION OF VARIOUS COMPUTATIONS

*Tonnage of overstowed cargo* in No. 1 tween decks which had to be discharged to get at the barley, as extracted from deck log book, Ex. A-1, August 26:

	<i>Short Tons</i>
Gilsonite .....	28
500 sx. asbestos (est. @ 50 lbs.).....	12
4,200 sx. flour (@ 40 sx. per ton).....	95
177,806 FBM timbers approx.....	294
<hr/>	
DISCHARGED TO GET AT BARLEY.....	429 short tons
 <i>Barley discharged</i> to reach and clear fire area and smoke-tainted barley:	
15 trucks, approx.....	335
2 gondola cars.....	55
<hr/>	
TOTAL CARGO DISCHARGED.....	819 short tons

*Appellee's net loss* does not appear as a single figure in the record. The invoice value of the shipment, cost and freight, was \$124,580 (Ex. 7). Agreed C.I.F. value of the non-delivered barley was \$23,301 (Tr. 18). Of this, \$10,338 was repaid from salvage (Tr. 19, 303). The balance of appellee's loss is therefore roughly \$12,963, including the general average deposit and payment of special charges for salvaging damaged barley. Its loss is certainly no more than 12%.





No. 16186

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**United States Court of Appeals**  
**For the Ninth Circuit**

---

AMERICAN MAIL LINE, LTD., a Corporation, *Appellant*,  
vs.

TOKYO MARINE & FIRE INS. CO., LTD., a Corporation,  
*Appellee*.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF WASHINGTON  
NORTHERN DIVISION

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**APPELLEE'S BRIEF**

---

EVANS, McLAREN, LANE, POWELL & BEEKS  
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# United States Court of Appeals

## For the Ninth Circuit

AMERICAN MAIL LINE, LTD., a Corporation,  
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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF WASHINGTON  
NORTHERN DIVISION

### APPELLEE'S BRIEF

#### JURISDICTION

Appellee agrees that the District Court had jurisdiction of the libel and cross-libel and that this Court has jurisdiction of this appeal.

#### COUNTER-STATEMENT OF THE CASE

##### Proceedings in the District Court

Appellee (libelant below) filed its cargo libel in admiralty *in personam* to recover damages for non-delivery of a portion of a shipment of barley loaded aboard the SS OREGON MAIL, owned and operated by appellant American Mail Line, Ltd. (herein sometimes called "the carrier") under the terms of its Bill of Lading VW-1-S, for carriage from Vancouver, Washington, to Shimizu, Japan (Libel, Tr. 3).

The appellant's answer alleged that the barley was not carried to destination by reason of having been

burned, charred and smoke damaged by fire caused by the burning of an electric flood light in the port after corner of the No. 1 lower hold of the vessel, and further alleged that the fire was caused without any fault or privity on its part, and claimed the immunity of the fire section of the United States Carriage of Goods by Sea Act, 1936 (COGSA), Section 4(2)(b) (46 U.S.C. 1304(2)(b)).

The carrier further alleged that if the loss and damage to the shipment was caused by fault or negligence of the carrier, such negligence was fault or error in the navigation or management of the vessel, for which it was excused under Section 4(2)(a) of COGSA (46 U.S.C. § 1304(2)(a) (Answer, Par. VIII and IX, Tr. 8-10)).

It further claimed a set-off, and cross-libelled, for General Average contribution in an amount to be determined by the General Average adjustment (Answer, Par. X, and Cross-Libel, Tr. 10-13). Appellee's Answer to the Cross-Libel denied the carrier's right to General Average contribution (Tr. 15-17).

Prior to trial, the parties stipulated to the quantity and value of the damaged and undelivered barley, and the carrier paid to appellee a portion of the proceeds of sale of barley salvaged from the shipment (Pre-Trial Stipulation, Tr. 18-20).

The case was tried on the following factual issues raised by the Answer and Cross-Libel:

1. Was the barley in question damaged by "fire"?
2. If so, was such damage caused by the actual fault or privity of the carrier?

3. Did the damage to the barley result from error in navigation or management of the vessel, or in the care and custody of the barley?

The trial court decided the first issue by finding and concluding that the barley was damaged by fire (Finding XII, Tr. 29, Oral Opinion, incorporated in Finding XVI, Tr. 20-23; Conclusion III, Tr. 33).

The trial court determined the second issue by finding and concluding that the carrier, through its Port Captain, Greenwood, was negligent, and at fault and in privity, in delaying for an unreasonably long time in acting for the protection of the shipment of barley, and that such negligence was a proximate cause of the damage to the barley (Finding XIII, Tr. 30-31, Oral Opinion, Finding XVI, Tr. 20-23; Conclusion III, Tr. 33).

The trial court decided the third question by finding and concluding that the officers and crew of the SS OREGON MAIL were negligent in the care and custody of the cargo in respect to the burning and use of the cargo lights in the No. 1 lower hold (Finding XII, Tr. 29-30; Conclusion IV, Tr. 34).

The trial court entered its decree awarding appellee its damages in full, and denied the appellant's claim for General Average contribution (Tr. 35-37).

The carrier appealed and assigns as error in this Court: the finding that it was negligent and at fault and in privity, in delaying for an unreasonably long time in the application of CO<sub>2</sub> (Specification of Error No. 2, Br. 16); the conclusion that the carrier is liable for damages resulting from its negligence and fault in



the protection of cargo, after commencement of a fire caused by negligence of the ship's officers and crew (Specification of Error No. 1, Br. 16); and denial of its claim for General Average, and special charges in connection with salvage of the barley (Specifications of Error 3, 4, Br. 16, 17).

Appellee was not aggrieved by the Decree below and does not appeal therefrom, but has filed a Statement of Points (Tr. 306), and assigns as error the trial court's finding that the barley was damaged by fire, rather than heat.

In this posture of the case appellee submits that if the Court sustains the finding and conclusion of the trial court that the carrier was at fault and in privity, and that its negligence was a proximate cause of damage to the barley, for which it is liable, the Court need not consider appellee's Specification of Error.

If the Court, however, overrules the trial court on the issues raised by the carrier's appeal, then it must consider appellee's contention that damage to the shipment of barley was not caused by fire, but by heat, and if it overrules the court below on that issue, this Court must affirm the decree, because the trial court found, in appellee's favor and against the carrier, that the damage resulted from negligence in the care and custody of the cargo, for which the carrier is not excused under COGSA, and appellant has assigned no error to that finding and conclusion.

### **Introduction to the Evidence**

In its Statement of the Case, appellant's brief ignores the trial court's findings on important points, to

which it has assigned no error, emphasizes evidence which the trial court obviously rejected, and seeks to minimize or gloss over the testimony which the court accepted as the basis for its determination that the carrier was negligent in delaying unreasonably before acting after the OREGON MAIL arrived at Seattle on August 21, 1955.

Appellee will therefore restate the evidence which supports that finding, and review the evidence which bears on the issues of whether the barley was damaged by fire, or by heat, and whether the carrier exercised due diligence to make the vessel seaworthy.

#### **Information Available on the Ship on August 21, 1955**

The barley was loaded in bulk at Vancouver, Washington, on August 17, 1955 (Finding III, Tr. 24; Tr. 130). A portion was loaded into the No. 5 hatch, but is not involved in this case. The remainder was loaded into No. 1 hatch, filling the No. 1 lower hold and a part of the lower 'tween deck (Tr. 130, 133). The vessel then proceeded to Longview, Washington, where lumber was loaded into the No. 1 lower 'tween deck (Tr. 135-6). After departing from Longview, the vessel arrived at Vancouver, British Columbia, at 11:38 A.M., August 20. There it loaded general cargo, including cargo for the No. 1 hold (Tr. 138, 139).

At 6:00 P.M., August 20, while the vessel was at Vancouver, B.C., the Second Officer, Norman L. Tomlin, observed smoke in the Rich audio smoke detector cabinet in the bridge, or wheelhouse, and determined that the smoke was coming from the No. 1 lower hold. He notified the Chief Mate, Rodney Palmer, and the

Master, Captain Wilmarth (Tr. 46, 47). Palmer and Wilmarth inspected the smoke detector cabinet in Tomlin's presence, and smoke was visible at that time (Tr. 67).

Tomlin and Palmer then made an inspection of all accessible spaces on the vessel (Tr. 143). Tomlin took the precaution of closing the dampers on the ventilation system for the No. 1 hold, which were located on the king post (Tr. 47). Palmer entered the No. 1 resistor house, and learned that the switches for the cargo lights in No. 1 hatch were on, and the fuses for those circuits were in place (Tr. 146-147).

The Master ordered a continuous or frequent watch maintained on the smoke detector cabinet (Tr. 111). The vessel sailed from Vancouver, B.C., at 10:25 P.M., August 20. During that night, there was "a slight change, increase in the smoke" (Tr. 48).

The vessel arrived in Seattle at 6:57 A.M., August 21. A further examination of the vessel was made, and Palmer found smoke coming from the exhaust vent on the No. 1 king post (Tr. 146). The smoke was grayish, of a light to moderate density (Tr. 150). This exhaust vent serves only the three compartments of the No. 1 hold. A visual examination of the upper and lower 'tween decks disclosed no evidence of fire.

The observation of smoke at the exhaust vent was reported to Captain Wilmarth (Tr. 77).

Appellant's brief (pp. 7-9) asks this Court to ignore the foregoing evidence as to the information which the ship's officers obtained between 6:00 P.M., August 20,

and 9:00 A.M., August 21, and accept instead the testimony of Captain Wilmarth that an odor, rather than smoke, was reported to him, and that the first report of smoke he received was on the morning of August 21, and that he himself saw no smoke on August 20, or 21 (Appellant's Brief, 6-9).

Unfortunately for appellant, the trial court rejected this testimony of Captain Wilmarth and found the facts as follows:

(1) On the evening of August 20, smoke was observed in the smoke detector, coming from the No. 1 lower hold;

(2) A suspicious odor was detected in the area in which the air from the smoke detector was exhausted;

(3) The switches controlling the cargo lights for the No. 1 hold were on, and the fuses in place;

(4) An inspection of the vessel was made and no indication of any heat, smoke, odor, or fire was discovered in relation to any compartment except the No. 1 lower hold.

(Finding VIII, Tr. 27-28)

(5) On the morning of August 21, the appearance of smoke in the detector cabinet continued, and the odor of smoke was more pronounced:

(6) Smoke was reported coming from the No. 1 king post exhaust vent.

(Finding IX, Tr. 28).

In all probability, the trial court relied little on Wilmarth's testimony as to events of the 20th and the morning of the 21st, because it knew that three weeks prior to



trial Wilmarth was unable, even with the assistance of the ship's log, to recall that he had been aboard the vessel as Master prior to the morning of August 21 (Tr. 105-106).

Appellant also places some reliance on two entries made by Palmer in the log, Ex. A-1, bearing the times 1800, August 20, and "Note 0900," August 21. Aside from the fact that the entries are questionable on their face, being out of time sequence, each of them was contradicted by Palmer himself in some respect. Contrary to the entry on August 20, Palmer testified that Tomlin reported smoke (not odor) in the smoke detector, at 6:00 P.M., August 20 (Tr. 142). Contrary to the entry of August 21, he himself found grayish smoke of light to moderate density (not odor) at the king post exhaust vent on the morning of August 21 (Tr. 150).

No error is or could be assigned by appellant to the six evidentiary findings set forth above, based as they were on the testimony of ship's officers, called by the appellant, and much of it given during direct examination.

In any event, Wilmarth's telephone report to Greenwood, the carrier's Port Captain, at 9:00 A.M., August 21, shortly after the vessel's arrival in the carrier's home port, reveals more than his testimony at the trial, as to the knowledge Wilmarth had at that time. He told Greenwood:

"We have all the indications of a fire in number one lower hold." (Tr. 116)



### Greenwood's Investigation

Greenwood testified that he was called by Wilmarth shortly after 8:00 A.M., August 21. He called Mr. James Gow to attend for American Mail Line because it was his immediate reaction to call for a surveyor experienced in giving him information and looking after the carrier's interests (Tr. 223).

Greenwood and Gow arrived at the vessel at 11:50 A.M. and 11:55 A.M., respectively, that morning (Ex. A-1, August 21).

The observations which Greenwood and Gow made, and the information which they obtained, were in startling contrast to the facts known to the ship's officers.

They went into the pilothouse, and observed an odor which in their opinion was stronger in the area of the smoke detecting system (Tr. 177). (Wilmarth testified that the air entering the smoke detector cabinet was exhausted onto the wing of the bridge and did not enter the wheelhouse. He could not recall that he ever smelled the odor in the wheelhouse (Tr. 107-110)).

Gow could not determine what the odor was, although in his opinion it had a smoke taint, but it was not heavily pronounced (Tr. 177). Close observation of the smoke detector cabinet satisfied Gow that the taint or odor was coming from the cabinet. He could not determine which compartment it was coming from, although he felt there was a slight indication that it was more pronounced from the No. 1 hold (Tr. 178). On cross-examination, however, he conceded that the smoke detector was concentrated on the suction line from the No. 1 hold, and that he was then satisfied that the odor

came from the No. 1 lower hold (Tr. 214-215). Gow made no personal inspection at the king post exhaust vent, but it was reported to him that an odor was detected there (Tr. 214). He did not question any of the ship's officers as to whether they had observed smoke prior to that time, because it wasn't necessary. He had been called down to observe the smoke detector cabinet, and if there had been smoke prior to that time, they would have said so, and he would have seen it himself (Tr. 216). He could suggest no condition, other than heating of the barley cargo, which could have caused the odor which was observed (Tr. 215).

Greenwood testified Captain Wilmarth's telephone report to him was of a suspicious odor (Tr. 223; cf. Wilmarth, Tr. 116). On direct examination he was not questioned about specific conditions aboard the vessel on August 21 (Tr. 222-223).

On cross-examination, he stated that he asked Wilmarth and Palmer how long the odor had been present (Tr. 229). All they would volunteer was that this odor was present (Tr. 230). Although smoke in the smoke detector cabinet had been reported to Wilmarth and Palmer by Tomlin, and was visible in the cabinet when they inspected it in Tomlin's presence (Tr. 46, 66-67, 142), and Palmer had observed smoke at the king post exhaust vent (Tr. 146, 150) and reported it to Wilmarth (Tr. 77), to the best of Greenwood's knowledge, they denied that smoke had been observed (Tr. 230).

At trial he testified that on the morning of August 21, he inquired about the cargo lights, and learned that the fuses had been discovered in place on the evening of

August 20. When his deposition was taken three weeks prior to trial, he could not recall whether that information had come out on that particular day, or somewhere along the line, and he based his testimony at trial on his feeling that one of his first questions would be whether the cargo lights were turned out (Tr. 231-232). Greenwood did not know whether he conveyed the information about the cargo lights to Gow (Tr. 232). Greenwood knew that cargo lights could cause a fire in grain or other cargos (Tr. 233). Before leaving the vessel on August 21, Greenwood determined that the vessel would continue to load cargo, including cargo to the No. 1 hold, but a continuous watch was to be maintained on the smoke detector apparatus (Finding IX, Tr. 28-29). Greenwood could have directed that loading be discontinued (Tr. 236-237).

### **Conclusions Reached on August 22**

Greenwood and Gow returned to the OREGON MAIL, which had then shifted to Pier 88, Seattle, the following day, August 22.

Gow detected a more pronounced condition at the smoke detecting cabinet. The air sample coming from the No. 1 hold was darker or heavier than the air samples from other spaces. He saw no smoke at the king post exhaust vent, but he sent his assistant up to the vent. As a result of the observations made by himself and his assistant (who was not called as a witness), Gow, Greenwood and Wilmarth were convinced there was a fire in the No. 1 lower hold (Tr. 181-182).

The decision to apply CO<sub>2</sub> was based on the smoke

particles or samples from the No. 1 lower hold, and the condition at the exhaust ventilator.

### **Damage by Heat or Fire**

The trial court found and concluded:

“From the condition and scorched, fire-burned appearance of libelant’s Exhibit No. 2, from the long continuing emanations of smoke and the registration of smoke on the detection apparatus, beginning August 20, 1955, and from the great amount of heat in the crackling barley taken in buckets out of the hold on August 25, 1955, that there was a fire in the barley cargo, which fire existed from the time smoke was first observed on August 20, 1955.” (Finding of Fact XII, Tr. 29-30, Court’s Oral Opinion, Finding of Fact XVI, Tr. 20-23)

We turn now to the evidence adduced, and upon which the court relied, in finding that the damage to the barley was caused by fire, not heat as appellee contended.

There is no evidence in the record that a flame or glow was observed in the barley by any person at any time.

It is conceded, of course, that the damaged barley was not subject to visual inspection prior to the application of CO<sub>2</sub>.

The No. 1 hold was inspected, however, by Palmer, who entered the hold at 10:10 A.M., 1:50 P.M. and 2:15 P.M., August 25, in the course of discharge of the barley (Ex. A-1, August 25). At 2:15 P.M. he took with him a small hose, with which he applied water to the area, from a position where he was surrounded by barley, and there observed no flame or light (Tr. 278-284).



Under the testimony of appellant's witness Gow, application of CO<sub>2</sub> alone does not extinguish a fire but merely shuts off the supply of oxygen, and when oxygen again becomes available "that glowing mass will come right back up again either to a heavier glow or to an actual fire" (Tr. 208-209). Thus, under appellant's own evidence, if the barley had been afire prior to the application of CO<sub>2</sub>, when oxygen again became available to it shortly prior to the time Palmer entered the hold at 2:15 P.M. on August 25th, the barley would have come back to a glow or flame but it was Palmer's testimony that it did not do so.

In the absence of direct testimony of the existence of a flame or glow, the court below relied on the condition of the barley itself, and testimony concerning emanations of smoke, noise and heat from the barley.

We must first consider the sample of scorched barley itself, upon its own observation of which the trial court relied heavily in support of its finding that the damage was caused by fire. Appellee introduced into evidence its Exhibit 2, a sample of charred barley delivered to appellee's representatives by appellant's surveyor, Gow. Gow, who was present during the discharge of the damaged barley from the hold of the OREGON MAIL on August 25, testified that there was no barley which he observed aboard the vessel which was more heavily charred or damaged than the sample which he preserved and a part of which was delivered to appellee and introduced in evidence as its Exhibit 2 (Tr. 206-207, 239, 241). (A similar quantity of the damaged barley was delivered to Laucks Laboratory, on behalf of the



appellant, but appellant introduced no evidence relating to this sample.)

With reference to the appearance of the barley, upon which the trial court relied, and which is available for inspection by this Court, appellee's witness, Charles V. Smith, a chemical engineer and partner in a Seattle commercial testing laboratory since 1946, testified, based upon experiments which he performed involving the application of heat to No. 2 two-rowed Western barley, the precise barley involved in this case, that the normal moisture content of the barley is driven off into water vapor at a temperature of 212° Fahrenheit; that the barley browns in the vicinity of 400°; that at 500° the barley gives off the parched odor of overcooked cereal; that at 550° there is a blackening and destructive distillation of the chemical structure of the barley in which acrid fumes are given off and the smell of burned rags or cereal is manifest; that charring begins at about 500° or 550° Fahrenheit and is thorough when the barley reaches 800°. He pointed out that commercial production of charcoal is accomplished at temperatures in the range of 550° to 800°. He further testified that a temperature of 1200° would be necessary to produce a color which would "just be visible" in any solid material (Tr. 246-247, 245, Ex. 3).

Smith testified that during an experiment in which he placed No. 2 two-rowed Western barley in an oven at a temperature of 600° Fahrenheit for a period of twenty minutes, he produced charring and chunking of the barley (Tr. 249). This barley was introduced into evidence as Libellant's Exhibit 4. The highest tempera-

ture attained in the barley itself during this experiment was a temperature of 685° (Tr. 249-250).

Based upon this experiment, the absence of ash, and the tarry appearance of Exhibit 2, and the identical condition of Exhibit 4, the controlled barley which reached only 685°, it was Smith's opinion that the barley damaged aboard the OREGON MAIL had not degenerated as a result of flame or glow and had never been subjected to a temperature in excess of 800° (Tr. 250-253).

Appellant presented no conflicting scientific testimony.

Appellant did, however, present certain other testimony in an attempt to support its contention that the barley was damaged by fire. This evidence may be summarized as follows:

1. The testimony of Second Mate Tomlin as to the condition and appearance of the electrical cable leading to the cargo light on the port side, aft of the square of the hatch in the No. 1 lower hold. Tomlin testified that cable was blackened and stiff and charred, and the paint on the overhead was blackened and charred, but not blistered (Tr. 54-56). He was not able to describe too well the various conditions in and about the lights, the cable and the overhead at that time (Tr. 57).

Tomlin stated that he had, on one prior unidentified occasion, observed the effect of fire on electrical cable similar to the cable in the No. 1 lower hold, that based on that experience he was able to state that the condition of burned armored electrical cable such as was in this hold, differed in appearance and feel "from the

same cable in ordinary condition" (Tr. 60), and that there was "not much" difference between the cable he had felt on that other occasion and the cable in the No. 1 lower hold of the OREGON MAIL (Tr. 62). On the basis of that observation and feeling of the cable, it was his opinion or conclusion "that there had been a fire around the lights in the hatch." Tomlin had had no particular educational background in the field of physics or chemistry (Tr. 57, 58).

2. Captain Wilmarth testified that following the discharge of the damaged barley, he personally went into the hold and observed the cargo light and the physical condition of the after part of the No. 1 lower hold. The paint work was scorched and discolored, and the cargo light was blackened (Tr. 91).

Captain Wilmarth had previously observed "small fires on various vessels that I've been in, paint locker fires and galley," and observed the metal surfaces where such fires occurred (Tr. 92-93). On the basis of his examination of the overhead in the No. 1 lower hold, his conclusion was that there had been a fire in that area, but he was unable to judge the intensity of the heat or fire (Tr. 102-103).

Wilmarth's definition of "fire" did not necessarily include the notion of visible flame to his mind, although it usually did (Tr. 120). On the other occasions to which he testified, when he had observed the effect of fire on other vessels, he had seen flame and that was what had indicated the existence of a fire to him on those occasions (Tr. 121). He did know, however, that painted metal surfaces could become scorched or blackened by

heat in the absence of flame (Tr. 121). In fact, he had observed conditions similar to those in the No. 1 lower hold which he knew to have been produced by heat in the absence of flame (Tr. 122).

3. The testimony of Palmer as to the appearance of the electrical cable and general condition of the No. 1 lower hold was similar to the testimony of Tomlin and Wilmarth (Tr. 155-157) but he was not asked to state his conclusion as to whether a fire had occurred.

4. The testimony of appellant's surveyor, Gow. Gow heard a definite crackling in the barley behind the lower hold hatch coaming, when he went into the No. 1 lower hold (Tr. 194-195), on August 25 (Tr. 201). Very light smoke was coming from the barley, but he observed no flame or glow then or at any other time (Tr. 195, 202-203). Thereafter, he recommended that water be sprayed on the barley behind the coaming, by the ship's officers (Tr. 196). From the heavily charred and burned condition of the barley, Gow formed the conclusion that it had been on fire (Tr. 200).

Gow did not know what effect a temperature sufficient to sustain a glow or flame would have on barley (Tr. 203), although his definition of fire necessarily involved a condition of flame or glow (Tr. 202). He supposed that flame or glow would necessarily reduce some of the components of the barley to ash (Tr. 204). At the trial he first stated that in the samples of barley that he removed from the hold he "observed what would appear to be ash" (Tr. 204). At the time his deposition was taken on April 16, 1958, however, in answer to the question "Did you observe any barley which was re-



duced to ash," his answer was "No" and to the question "Did you observe any ash?", his answer was "No, sir." He had no knowledge at the time of trial that he did not have at the time of his deposition (Tr. 204-205). Ultimately, at the trial, in answer to the question: "Did you see actual ash?" Gow's answer was: "No, I didn't see actual ash" (Tr. 206).

Gow knew that heat would damage grain cargo. In fact, he could suggest no other condition which might have caused the odor which he detected coming from the No. 1 lower hold on the morning of August 21 (Tr. 214-215). He did not know at what temperature barley would crackle, and he did not know what temperature the barley reached at any time (Tr. 209-210).

5. Several witnesses testified that there was a crackling noise in the barley on August 25, and that when a bucket of barley was brought up on deck alongside the No. 1 hatch on that date, the bucket was extremely hot, and the barley was smoking and crackling (Wilmarth, Tr. 92; Greenwood, Tr. 226; Gow, Tr. 195). There was no testimony as to the temperature of the barley or the bucket and no testimony that the barley showed flame or glow. There was no testimony other than that of Gow, concerning the significance of the crackling noise. Gow's survey report had stated: "Air filtering thru and diffusing the CO<sub>2</sub> caused scorched and blackened grain to crackle." That was his opinion as to the cause of the crackling, at the time of trial (Tr. 209).

Finally, with reference to the issue of whether or not there was a fire, it is pertinent that appellant failed to call Seattle Fire Chief Kennedy, who was on board the



OREGON MAIL, on August 22nd and 23rd (Ex. A-1, 2230 August 22; 1930 August 23) or Fire Chief Graham, who was on board on August 23rd and August 25th (Ex. A-1, 0905 August 23; 1610 August 25) or the officers of the United States Coast Guard who were aboard August 23 and 25 (Ex. A-1 0920, August 23; 1430 August 25). It did not produce evidence of a scientific character concerning the sample of the most severely damaged barley which was and had been in its possession or that of its representatives since the date of the fire (Tr. 206-207, 216-217).

### **Due Diligence to Make the *Oregon Mail* Seaworthy**

Finding the carrier in privity and at fault for the loss and damage to the barley, the trial court was not required to find whether the carrier had exercised due diligence to make the vessel seaworthy in passing on its Cross-Libel for General Average contribution.

The trial court's findings do, however, indicate that it rejected the carrier's testimony that the fuses had been removed from the circuits for the cargo lights in No. 1 lower hold. The carrier contended that these fuses were removed in the early morning of August 17, the day the barley was loaded (Testimony of 2d Electrician McLeod, Tr. 164). The court found, however:

“ \* \* \* Said fixed electric cargo lights in the No. 1 lower hold were improperly and negligently turned on or permitted to remain burning after the loading of bulk barley into the No. 1 lower hold of the SS OREGON MAIL had commenced, by the negligent act or omission of the ship's officers and crew.” (Finding VII, Tr. 27)

Appellant assigns no error to that finding. McLeod's

testimony did not compel a finding that the fuses had been removed from this circuit on August 17, because he further testified that there were errors in the index cards on the doors of the switch panels on the OREGON MAIL, and he could not testify whether they were corrected before or after this casualty (Tr. 166-169). Appellant asks the court to infer from the testimony of Night Mate Hardie that the fuses were replaced during cargo operations at Longview, but Hardie did not so testify (Tr. 257-277) and appellant did not produce or explain the non-production of the stevedore foreman and the ship's electrician who would have had knowledge of the replacement of the fuses, if they were replaced at that time.

The general practice in the American merchant marine is to remove fuses from the circuits for cargo lights in grain compartments to eliminate the fire hazard (Tr. 44). Such removal is good seamanship and standard practice (Tr. 232-233).

### **SPECIFICATION OF ERROR**

The District Court erred in finding and concluding "that there was a fire in the barley cargo, which fire existed from the time smoke was first observed on August 20, 1955," and that "the barley was set afire" (Finding XII, Oral Opinion, Finding XVI, Tr. 20-23; Conclusion III, Tr. 33). Appellee's specification of error also goes to the reference to "fire" in Finding XIII, Tr. 30.

**ARGUMENT IN REPLY TO APPELLANT'S BRIEF****1. Argument on Appellant's Specification of Error No. 2.**

The trial court properly found the carrier in privity and at fault for not properly protecting the barley, after the arrival of the ship at Seattle.

Appellant mistakes the basis of the trial court's decision.

The trial court convicted appellant of negligence in delaying unreasonably before acting for the protection of the cargo, after the arrival of the vessel in Seattle, under the circumstances existing and known to it at that time, or which in the exercise of due care, it could have learned.

Appellant's port captain Greenwood and surveyor Gow, upon whom he relied, had available to them, promptly on the vessel's arrival in Seattle, information which would indicate to any prudent person that prompt, immediate and emergency action was required for the protection of the cargo. Instead of acting they maintained a watch on the smoke detector, and continued to load cargo to the vessel including cargo to the hold in which the barley was stowed.

**The Information Available to Greenwood on August 21**

The trial court found appellant negligent and at fault for the damage to the barley, because its Port Captain, Greenwood, delayed unreasonably before acting to protect the barley shipment, when such action was required under the circumstances existing and known to him on August 21, or which in the exercise of due care, he should have learned (Finding XIII, Tr. 30-31).

Appellee has set forth in detail the information which the ship's officers had obtained by 9:00 A.M., August 21, when Wilmarth notified Greenwood that: "We have all the indications of a fire in number one lower hold" (Tr. 116). This evidence is summarized in this brief, *supra*, at pp. 5-8.

Greenwood did not learn smoke had been observed in the smoke detector cabinet, coming from No. 1 lower hold, although it had been reported to the Chief Officer and Master at 6:00 P.M. the preceding evening by the Second Officer, who observed that it increased during the night. He did not learn that smoke had been observed at the king post exhaust vent by the Chief Officer, who reported it to the Master, prior to the time Greenwood was called that morning. Although the smoke at the exhaust vent increased during August 21 (Tr. 152), he apparently did not observe smoke there, or at the detector cabinet.

Although Greenwood testified at trial that he inquired about the lights in the No. 1 lower hold on August 21, three weeks prior to trial he had not been sure that he learned they had been turned on in the barley cargo then or later. In any event, he did not report that information to Gow, upon whom he was relying to advise him and look after the carrier's interests, although he knew it was standard practice to remove fuses for cargo lights, because of the danger of fire.

Gow made no inquiry of the ship's officers, testified he saw no smoke on that date, and was not sure that the odor he detected in the pilothouse (where the Master did not detect an odor at any time) came from



the No. 1 lower hold, although the smoke detector was concentrated on the suction line from that compartment, the odor persisted, and Gow could not suggest any condition other than heating of the barley, which could have caused that odor.

In short, Greenwood was advised that the vessel had all the indications of a fire in the No. 1 lower hold, but he and Gow saw no evil, heard no evil, and thought no evil, on August 21.

Apparently content with that information, although he had no way of determining whether the barley cargo was heating (Tr. 234), Greenwood ordered no change in the vessel's loading schedule, and before protective action was begun, at 1:00 P.M. on August 22, additional cargo was loaded into the No. 1 hatch, over the barley (Findings IX, X, Tr. 28-29).

### **Action Finally Taken**

Greenwood and Gow themselves testified in effect to the action which should have been taken promptly after Greenwood was notified of the emergency by Wilmarth, under the circumstances existing on August 21. They finally ordered that loading be stopped, and that the cargo over the barley in the No. 1 hatch be discharged at 1:00 P.M., August 22, acting on the basis of information that was available on the ship not later than 9:00 A.M., August 21, twenty-eight hours earlier, before the additional cargo had been loaded into the hatch.

The conditions which required the action taken at 1:00 P.M., August 22, existed at 9:00 A.M., August 21, and if the action taken by appellant on the later date was necessary and proper, as it contends, it was neces-



sary and proper promptly after the arrival of the vessel on August 21. Appellant delayed unreasonably in acting for the protection of the cargo, and the trial court was correct in so finding.

### **The Standard of Care**

The standard of care to which appellant should be held has been defined in *Great Atlantic & Pacific Tea Co. v. Lloyd Brasileiro*, 159 F.2d 661 (2d Cir.) cert. den. 331 U.S. 836, 67 S.Ct. 1519. In that case, the carrier claimed exoneration from liability for fire damage to cargo, under the Fire Statute, R.S. 4282, 46 U.S.C. § 182. During a voyage terminating at Brooklyn, flames had been observed in the vessel's reserve coal supply, stored in the cross-bunker, situated immediately aft of the No. 3 hatch, and separated from it by a thwartships wooden bulkhead. A cargo of castor beans was stowed in No. 3 hatch. Flames reappeared in the coal after the vessel reached Brooklyn, and the coal was first wetted and then discharged, the discharge being completed by midnight, December 31. At that time the limber boards in the cross-bunker, and the bulkhead between the bunker, and the No. 3 hatch were charred and burned.

The owners' port engineer, one Borges, had boarded the vessel on December 30, and inspected the coal bunker, but observed no flames at that time. He directed the discharge of the remaining coal. At 7:30 A.M., January 1, fire was reported in the castor beans, just forward of the thwartships bulkhead, caused by the fire in the coal. The trial judge exonerated the carrier, holding its Port Engineer, Borges, justified in believing that the cargo was not endangered, although the Mas-

ter had been negligent. Speaking of the duty imposed on Borges, the appellate court said:

"... it was his duty from what the master told him, and what he saw, not to accept the master's assumption that all was well, but to push inquiries home, to cross-examine the master, to examine the engine room logs, and in general to bestir himself until he had all the information that anyone on board had. . . . (the port engineer) was charged with providing for the safety of a cargo worth over half a million dollars; the necessary precautions were no more than to extract from those on board whatever they knew; . . . Indeed, he did think the fire important enough to go himself to the scene; and what he saw, coupled with what he should have learned, charged him with immediate action.

\* \* \*

"The measure in such cases is not what the owner knows, but what he is charged with finding out. He may, if he will, put his ship at hazard and answer as he can to his underwriters, but to the cargo he must not be indifferent; he is relieved of his absolute liability at common-law only upon condition that he exercises care measured by the occasion." (159 F.2d at 664, 665)

This Court cited the foregoing decision with approval in *States Steamship Company v. United States*, 259 F. 2d 458, at 466 and 474.

In that decision, this Court denied limitation of liability because of the knowledge which the shipowner's port engineer had, and the knowledge which would have been available to him, in the exercise of ordinary care, concerning the crack sensitivity of the PENNSYLVANIA.

In its opinion on the Petition for Rehearing on Limi-

tation, this Court held that the "concept of liability" of the Limitation Act, and the Carriage of Goods by Sea Act was the same, that the shipowner is liable "*for all loss resulting from his failure to exercise effective control when he had the chance*" (quoting GILMORE and BLACK, *The Law of Admiralty* (1957) p. 696, italics by the court), 259 F.2d at 474. In the same footnote in which it quoted *Great Atlantic & Pacific Tea Co. v. Lloyd Brasileiro, supra*, as follows: "The measure in such cases is not what the owner knows, but what he is charged with finding out," the Court quoted with approval from *The Cleveco*, 154 F.2d 605, 613 (6th Cir.): "... knowledge means not only personal cognizance but also the means of knowledge—of which the owner or his superintendent is bound to avail himself—of contemplated loss or condition likely to produce or contribute to loss, unless appropriate means are adopted to prevent it." 259 F.2d at 474, f.n. 6.

See also *Spencer Kellogg & Sons v. Hicks*, 285 U.S. 502, 510, 52 S.Ct. 450.

Measured by these standards, the carrier was clearly negligent and at fault, through its privy, Port Captain Greenwood, for cursory investigation, inaction, and delay. The trial court's finding cannot be reversed unless it was clearly erroneous. *McAllister v. United States*, 348 U.S. 19, 75 S.Ct. 6.

### **Argument on Appellant's Specification of Error No. 1**

The trial court found the fire was caused by negligence of the ship's officers and crew in the care and custody of the cargo, in the use of the cargo lights. It further found that the carrier was negligent and at fault, through its port captain, Greenwood, in not properly protecting the barley after the arrival of the ship at Seattle on August 21. It found such negligence was a proximate cause of the damage to the barley. Under these findings, it properly concluded the carrier was liable (Finding XIII, Tr. 30-31; Oral Opinion, Finding XVI, Tr. 20-23; Conclusion III, Tr. 33).

### **Appellant's Real Position**

In its argument under its Specification of Error No. 1, at pages 19-22 of its brief, appellant cites statements from cases under the Fire Statute, 46 U.S.C. 182, holding, in general, that the statute is not to be construed grudgingly. That much is conceded.

But under the facts as found by the trial judge, appellant's position on this phase of the case is precisely this:

Once a fire has begun as a result of negligence of the ship's officers and crew, the carrier is immune from liability for cargo damage, even though it is negligent, and at fault and in privity, in not properly protecting the cargo, and such negligence is a proximate cause of the damage to cargo.

### **Trial Court's Conclusion Was Proper**

Of course, no case, under either COGSA, or the Fire Statute, stands for the proposition which appellant



asks this Court to pronounce. *Earle & Stoddard v. Ellerman's Wilson Line*, 287 U.S. 419, 53 S.Ct. 200, cited by appellant, recognizes that immunity from liability under the Fire Statute is lost where the owner acts negligently, or negligently fails to see that action is taken where there is a duty to act (287 U.S. at 427).

“If the mere happening of damage through an excepted peril releases the carrier from responsibility to take due measures to care properly for the cargo, then that must be because the happening of the damage has somehow brought an end to the obligation imposed by Section 3(2),<sup>1</sup> and, once that inconsequent proposition is stated, it will find few supporters.” Gilmore and Black, *The Law of Admiralty* (1957) p. 149.

“ . . . where damage has happened, all measures which are reasonably available, under the circumstances, ought to be taken to arrest or check the further destruction or deterioration of the goods.

“And that is so whether the original cause of the mischief was or was not a peril for which the shipowner was responsible under the contract.” Carver on the Carriage of Goods by Sea (9th Ed. 1952)

In *Great Atlantic & Pacific Tea Co. v. Lloyd Brasileiro*, 159 F.2d 661, the Court of Appeals for the Second Circuit, in an opinion by Judge Learned Hand, reversed a trial court decree granting exoneration to the shipowner, under the Fire Statute, because its Port Engineer was negligent in failing to act promptly for the protection of the cargo after the arrival of the ves-

<sup>1</sup>The reference is to §3(2) of COGSA, 46 U.S.C. 1303(2): . . . “the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.”



sel in port, although the fire was not caused by any negligence with which the ship owner was in privity. The court stated:

"... it is not important whether some of the damage had been done before Borges failed in his duty; any more than whether such preceding damage may have been one of the causes for the fire in the stow. If the owner would free itself from liability for such damage the doctrine of *THE VALLESCURA* imposes upon it the hard burden of proving how much was not caused by the wrong, a burden whose discharge ordinarily carries such small hope of success that it may not care to make the attempt." (159 F.2d at 665)

The Supreme Court denied certiorari. 331 U.S. 836, 67 S.Ct. 1519.

Appellant cites this decision in another portion of its brief, p. 23, but does not attempt to distinguish it.

*Schnell v. The Vallescura*, 293 U.S. 296, 55 S.Ct. 194, holds that where damage to cargo results from two causes, and the carrier is liable for damage from one cause and excused for damage from the other cause, the burden of segregating the damage from each of the causes is on the carrier, and if it fails to segregate, it bears the whole loss. That is the law under COGSA. *Edmond Weil, Inc., v. American West African Line*, 147 F.2d 363 (2d Cir.).

In this case, the trial court found the carrier in privity, and at fault, and that such negligence was a proximate cause of the damage. Appellant made no effort to segregate, the damages have been assessed, and appellant assigns no error to the amount.

The trial court's conclusion was correct.

### 3. Argument on Appellant's Specification of Error No. 3

The carrier is not entitled to General Average contribution, because the damage resulted from a cause for which it was responsible, as the trial court found. Additionally, it is not entitled to General Average contribution, because it failed to exercise due diligence to make the *Oregon Mail* seaworthy at the commencement of the voyage.

#### The Carrier Was Responsible

Under the form of "Jason clause" in appellant's bill of lading, Ex. 6, Clause 10, quoted in part in Appellant's Brief, p. 30, the liability of cargo to contribute in General Average is conditioned on "... the event of accident, danger, damage or disaster, ... for which, or for the consequences of which, the carrier is not responsible. . . ." The trial court held the carrier responsible for the damage to cargo, and by the terms of the contract of carriage, the carrier is not entitled to General Average contribution. Since the matter is governed by contract, the fact that some expense would have been incurred if the carrier had not been negligent is legally irrelevant.

#### Carrier Failed to Exercise Due Diligence

If this Court reverses the trial court's decree, and holds the carrier not liable, appellant is nevertheless not entitled to recover a General Average contribution, because it failed to exercise due diligence to make the OREGON MAIL seaworthy at the commencement of the voyage.

Even if the carrier is excused from liability under COGSA, or the Fire Statute, it may not recover in General Average if the fire resulted from its failure to exercise due diligence to make the vessel seaworthy at the commencement of the voyage. *Globe & Rutgers Fire Insurance Co. v. United States*, 105 F.2d 160 (2d Cir.), cert. den. 308 U.S. 611, 60 S.Ct. 175. *Standard Oil Co. v. Anglo-Mexican Petroleum Corp.*, 112 F.Supp. 630 (S.D.N.Y.).

In this case, the carrier assumed the burden of showing that the fuses for the cargo lights in the No. 1 lower hold were removed prior to, or during, the loading of the barley. Its witnesses testified that such removal was standard practice in the American Merchant Marine, and good seamanship, to eliminate the hazard of fire, in compartments loaded with grain.

Appellant offered testimony that the fuses for this circuit were removed, and argued that they had been replaced after the vessel's departure from the port of loading, but produced no witnesses who could so testify.

The trial court properly refused to find that the fuses had been removed, and found instead that the lights were "... negligently turned on or permitted to remain burning after the loading of bulk barley into the No. 1 lower hold had commenced, . . . " (emphasis supplied) (Finding VII, Tr. 27).

The trial court did not find, and this Court should not find, that the carrier exercised due diligence to make the No. 1 lower hold seaworthy for the carriage of the barley. Appellant assigned no error to the quoted finding. The Cross-Libel was properly dismissed.

#### **4. Argument on Appellant's Specification of Error No. 4**

Appellant is not entitled to credit for special charges. No separate issue is presented under appellant's Specification of Error No. 4. If the carrier is liable for damage to cargo, it is not entitled to deduct from the salvage proceeds, expenses in connection with such salvage but must answer for the agreed value of the cargo. If it is not liable, and appellee is entitled only to the net salvage proceeds, then appellant is entitled to deduct expenses in the agreed amount of \$1490.84.

#### **ARGUMENT ON APPELLEE'S SPECIFICATION OF ERROR**

Appellant failed to sustain its burden of proving that the barley was damaged by a "fire" in the legal sense. The trial court's finding to that effect is without substantial support in the record, and cannot rest on its own evaluation of the appearance of Exhibit 2. The Court will not reach this point, however, unless it reverses the trial court on Appellant's Specifications of Error Nos. 1 or 2.

#### **Damage Was by Heat Not Fire**

The evidence did not establish that the barley was damaged by fire. The carrier had the burden of proving that the damage was occasioned by a cause for which it was not liable. *Schnell v. The Vallescura*, 293 U.S. 296, 55 S.Ct. 194. The same rule applies under the Fire Statute. *The Buckeye State*, 39 F.Supp. 344 (W.D.N.Y.)

The trial court's basic finding, in its Oral Opinion, Finding XVI, Tr. 20-23, and Finding XII, Tr. 29-30, indicates that it relied principally or entirely on the following evidence:



- (1) The appearance of Exhibit 2.
- (2) The emanations of smoke and the registration of smoke on the detection apparatus.
- (3) The great amount of heat in the crackling barley.

Two witnesses testified concerning samples of barley taken from the hold: Gow for appellant, and Smith, for appellee.

Gow testified that Exhibit 2, which he preserved and delivered to appellee's representatives, was representative of the most severely damaged barley aboard the vessel, and that he observed no barley which was more heavily charred or damaged (Tr. 207-208). In his experience as a marine surveyor, he had been concerned with twenty-five or thirty instances of fire damage to cargo and was familiar with the appearance and effect of fire as it related to the holds of steel vessels (Tr. 176), but he had never observed barley that he knew to have been damaged by heat, in the absence of flame or glow (Tr. 218) although he knew heat would damage a grain cargo (Tr. 215). He did not know what effect a temperature necessary to sustain a flame or glow would have on barley (Tr. 203-204). He supposed that flame or glow in barley would necessarily produce ash, but he observed no ash in any barley aboard the vessel, or taken from the vessel (Tr. 205-206). He could not state that the barley had reached any specific temperature at any time (Tr. 210). No effort was made to qualify him as an expert witness in the field of chemistry or physics. Nevertheless, he testified that his observation of the condition of the barley enabled him to form the conclusion that it had been on fire (Tr. 200).



Smith, a chemical engineer, testified that he had performed an experiment in which he heated identical barley, until it reached a temperature of  $685^{\circ}$ , and that the condition of this barley, introduced in evidence as Exhibit 4, was identical to Exhibit 2, the most severely damaged barley aboard the OREGON MAIL. He testified that that experiment, coupled with the shiny, tarry appearance of Exhibit 2, indicating the presence of substances which would have been reduced to pure chars if exposed to heat in excess of  $800^{\circ}$ , and the absence of ash, indicated to him that the barley had never degenerated from glowing or fire (Tr. 246-253).

Appellant introduced no contrary evidence.

Clearly, Gow's opinion, based on the appearance of the barley, is not substantial evidence in support of the trial court's reliance on the appearance of Exhibit 2.

If the trial court based its finding on its own evaluation of Exhibit 2, in the face of expert testimony to the contrary, its finding cannot be sustained. Neither a trial nor an appellate court may "judicially rely" on its own knowledge and skill, whether the issue be one of maritime affairs, or a technical issue, but must decide the case on the evidence before it. See *Hanover Fire Insurance Company v. Holcombe*, 223 F.2d 844 (5th Cir.), cert. den. 350 U.S. 895, 76 S.Ct. 154.

That smoke was observed over a long period of time, and that there was great heat in the crackling barley taken from the hold are undisputed, at least by appellee, but these facts neither compel nor permit a determination that the barley was on fire. Smith testified that water would be driven off the barley at  $212^{\circ}$ , and that

550° would produce both smoke and odors (Tr. 246, 252). No witness testified otherwise. No other witness testified to the temperature of the barley at any time, and only Gow, who did not know at what temperature barley would crackle, testified as to the significance of the crackling, and his testimony was that it was caused by the diffusion of CO<sub>2</sub> in the barley (Tr. 209).

The trial court did not refer to or rely on the opinions expressed by Tomlin and Wilmarth, based on the appearance of the electrical cable, and the painted metal surfaces of the hold, and that evidence does not furnish substantial support for the finding that there was a fire. Tomlin's testimony was, in essence, that the electrical cable in the No. 1 hold differed in appearance and feel from cable in good condition. He had no education or experience which would qualify him to distinguish between heat and fire damage. Wilmarth conceded that he had observed painted metal surfaces like those in the No. 1 lower hold similarly scorched and blackened by heat in the absence of flame.

The nature of the evidence which appellant produced bearing on the issue of fire adds significance to its failure to call the Fire Department personnel who were aboard the vessel on August 22, 23, and 25, and invites the conclusion that their testimony would have been unfavorable.

### **The Corn Cases**

Two United States District Court admiralty decisions have passed upon the issue of whether grain damage resulted from heat or fire, where the evidence closely paralleled the evidence here. *The Buckeye State*, 39 F.

Supp. 344 (W.D.N.Y.) ; *Cargo Carriers v. Brown S. S. Co.*, 95 F.Supp. 288 (W.D.N.Y.). Each case involved the reduction of a grain cargo, corn, to a darkened and charred mass, and the evidence indicated a cargo light as the source of heat. In each case the court found the damage resulted from heat, not fire, and held the carrier liable.

In *The Buckeye State*, *supra*, the court quoted with approval from *Western Woolen Mill Co. v. Northern Assurance Co. of London*, 139 Fed. 637 (8th Cir. 1905), cert. den. 199 U.S. 608, 26 S.Ct. 750, 50 L.Ed. 331, as follows:

“ ‘Fire’ is caused by ignition or combustion, and it includes the idea of visible heat or light. ‘No definition of fire can be found that does not include the idea of visible heat or light, and this is also the popular meaning given to the word. \* \* \* ’ ” (39 F. Supp. at 347)

The court continued: “Clearly damage may be done by ‘heat’ alone without ‘fire.’ ” The evidence in that case was that the damaged corn was a black charred mass in the area of the light fixtures; that vapor light globes were found partially melted and broken; and that the paint on the bulkheads, hatch coamings, and around the cargo lights was burned. Samples of corn from the vessel showed no ash. The court found there had been no fire, and held the libelant entitled to recover.

The evidence in *Cargo Carriers v. Brown S. S. Co.*, *supra*, was parallel to *The Buckeye State*, and this case, in that odor and/or smoke were first observed before the core of darkened and charred grain was uncovered. In addition, as here, grain was found adhering to a cargo

light. In that case actual flame did burst out when the damaged mass was uncovered. Nevertheless the court found the damage was caused by heat, and held the carrier liable.

In the absence of testimony that there was flame or glow, or that the temperatures reached would have produced flame or glow, the finding that there was a fire in the barley cannot be sustained. Under the evidence here the court should have found that the barley was damaged by heat, not fire. Its contrary finding is unsupported by substantial evidence and should be reversed if this Court reaches that issue.

### CONCLUSION

The trial court properly found the carrier negligent and at fault, through Port Captain Greenwood, in delaying unreasonably before acting to protect the cargo, and held it liable for the damage proximately caused by such fault. Under well-recognized principles, where a loss results in part from a cause for which the carrier is liable, it has the burden of proving, if it can, that part of the loss for which it is not responsible.

General Average was properly denied because the carrier was responsible for the loss, and additionally because it failed to prove due diligence to make the vessel seaworthy at the commencement of the voyage.

If the trial court's finding that the carrier was at fault and in privity, and its conclusion that it was liable for the loss are not sustained, this Court must consider appellee's contention that the finding that the damage was caused by fire was erroneous, and without substantial support in the record, and affirm the decree, on the

ground that the damage was caused by heat, resulting from negligence of the carrier in the care and custody of the cargo.

Respectfully submitted,

EVANS, McLAREN, LANE, POWELL & BEEKS

W. T. BEEKS

MARTIN P. DETELS, JR.

*Proctors for Appellee.*

BIGHAM, ENGLAR, JONES & HOUSTON

*Of Counsel*



No. 16188 ✓

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United States  
Court of Appeals  
for the Ninth Circuit

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VALLE LAWRENCE PROST,

Appellant,

vs.

MORRISON-KNUDSEN LIMITED,

Appellee.

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Transcript of Record

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Appeal from the United States District Court for the  
Northern District of California,  
Southern Division.

FILED

OCT 30 1958

PAUL P. O'BRIEN, CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## APPEARANCES

MAXWELL KEITH, ESQ.,

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111 Sutter Street,

San Francisco 4, California,

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EDWARD J. RUFF;

THELEN, MARTIN, JOHNSON & BRIDGES,

Attorneys at Law,

111 Sutter Street,

San Francisco 4, California,

For Appellee.



In the United States District Court for the Northern District of California, Southern Division

No. 37093

VALLE LAWRENCE PROST,

Plaintiff,

vs.

MORRISON-KNUDSEN LIMITED,

Defendant.

COMPLAINT ON COMMON COUNT AND  
FOR BREACH OF CONTRACT

Plaintiff complains of the defendant and for causes of action alleges:

I.

Plaintiff Valle Lawrence Prost is a resident of the City and County of San Francisco, State of California.

II.

Defendant Morrison-Knudsen Limited, is a wholly owned subsidiary of Morrison-Knudsen Company, Inc., a corporation, existing under the laws of the State of Delaware. Defendant exists under the laws of the Country of Australia, and does business in the City and County of San Francisco. It has an office at 120 Montgomery St., San Francisco. It enters into employment contracts with citizens of the United States at its office in San Francisco, for employment at Basrah, Iraq and elsewhere.

## III.

Jurisdiction is founded on diversity of citizenship. The matter in controversy exceed, exclusive of interest and costs, the sum of three thousand dollars.

## IV.

The defendant is indebted to the plaintiff in the sum of \$2,472.00, on account for work, labor and services of plaintiff, performed at the request of the defendant as a Pile Driver Foreman at Basrah, Iraq, during the period from July, 1956, to September, 1957; that defendants promised to pay to plaintiff the sum of \$2,472.00, therefor.

## V.

That defendant has not paid the same, not any part thereof.

As and for a Second Cause of Action Plaintiff Alleges:

## I.

Plaintiff realleges Paragraphs I, II, III, of said First Cause of Action and incorporates them herein as though fully set forth.

## II.

That on or about the Sixth day of July, 1956, plaintiff entered into a contract of employment with Morrison-Knudsen Limited, a corporation, wherein and whereby the defendant agreed to employ plaintiff as a Pile Driver Foreman for a period of two years or until the construction job at Basrah, Iraq,



was completed, at a monthly wage of \$900.00; that a copy of the contract is hereto attached, marked Exhibit A and made a part hereof.

### III.

That thereafter plaintiff went to Basrah, Iraq, under the terms of said contract and duly performed the terms of said contract, but said defendant has refused to allow plaintiff to continue his employment under the terms of said contract, and instead has prevented plaintiff from so doing by discharging Plaintiff without just cause on or about September 20, 1957.

### IV.

That there is now due and owing from the defendant to the plaintiff the sum of \$8,670.00 together with interest thereon at the rate of six per cent per annum from and after September 20, 1957, as plaintiff's salary for the uncompleted portion of his contract; and the sum of \$2,472.00 together with interest thereon at the rate of six per cent per annum from and after September 20, 1957, under the terms of Sections 6, 7 and 10 of said contract, all of which the defendant neglects and refuses to pay.

As and for a Third Cause of Action Plaintiff Alleges:

### I.

Plaintiff realleges Paragraphs I, II, III of said First Cause of Action and incorporates them herein as though fully set forth.

## II.

That on or about the Sixth day of July, 1956, the defendant orally promised the plaintiff employment at Basrah, Iraq, for a period of two years or until the completion of the defendant's construction project at Basrah, Iraq, at a wage of \$900.00 per month as a Pile Driver Foreman, and further promised him travel pay, transportation expenses, baggage expenses, per diem travel allowances, and return transportation fare.

## III.

That pursuant to said promises plaintiff went to Basrah, Iraq, and duly performed his work, services and labor at the special instance and request of defendant; but said defendant has prevented plaintiff from continuing his employment with defendant for said period of two years, and instead has discharged plaintiff without just cause on or about September 20, 1957.

## IV.

That there is now due and owing from the defendant to the plaintiff the sum of \$8,670.00, together with interest thereon at the rate of six per cent per annum, from and after September 20, 1957, as plaintiff's salary for the uncompleted portion of his employment at the special instance and request of defendants, and the sum of \$2,472.00, together with interest thereon at the rate of six per cent per annum, from and after September 20, 1957, as benefits due him for travel pay, transportation ex-

penses, baggage expenses, per diem allowance and return transportation, duly promised to plaintiff by defendant; all of which the defendant neglects and refuses to pay.

Wherefore, plaintiff prays judgment against the defendant for the sum of \$11,142.00, together with interest thereon at the rate of six per cent per annum from and after September 20, 1957, and for costs of suit incurred herein, and for such other and further relief as the court may deem just.

/s/ MAXWELL KEITH,  
Attorney for Plaintiff.

Trial by Jury Demanded.

EXHIBIT A

American Personnel  
Iraq  
Basra-Amara Road  
August 1, 1955

Morrison-Knudsen Limited  
Employment Contract

Name of Employee: Valle Lawrence Prost.  
Position Classification: Pile Driver Foreman.  
Monthly Salary Rate: \$900.00.  
Point of Hire: San Francisco, California.  
Date Salary to Commence: July 9, 1956.

Social Security Number: 497-09-8815.

Distribution of Salary: As Per Jobsite Allotment Schedule.

Person to Be Notified in Event of Emergency:

Name: Mrs. Francys M. Prost.

Relationship: Wife.

Address: 1080 Eddy St., Apt. 502, San Francisco, Calif.

Phone: WALnut 1-3162.

(Above address will be considered as Employee's permanent address or the address of the person with whom Contractor may communicate concerning personal matters relating to Employee.)

This Contract made and entered into this sixth day of July, 1956, by and between Morrison-Knudsen Limited, hereinafter called "Contractor" and (First) Valle (Middle) Lawrence (Last name) Prost hereinafter called "Employee."

Witnesseth:

Whereas, the Contractor is engaged in the performance of a construction contract for the Government of Iraq Development Board, and desires to retain the services of the Employee for work in connection with said construction contract.

Now, Therefore, in consideration of the premises and the mutual covenants, agreements and conditions hereinafter contained, the parties do hereby agree as follows:

### 1. Employment Subject to Construction Contract

The contractor employs the Employee for certain services in the construction work to be performed by the Contractor under said construction contract and said employment is in all respects subject to the provisions of said construction contract and the reasonable requirements and interpretations thereof.

### 2. Place of Employment

The services of the Employee shall be performed in Iraq, at any one or more of the places therein which may be designated by the Contractor, or at the Contractor's option, at such other place or places outside said country which the Contractor may designate in connection with the performance of said construction contract.

### 3. Position

(a) The Employee represents that he is fully qualified without the benefit of any further training or experience to perform the duties of the position for which he is hired as specified above.

(b) If the Employee is used, for the convenience of the Contractor, in any equivalent or lower classification than that for which he is hired, to which he may hereafter be assigned by the Contractor, he will perform work in such classification to the best of his ability at the salary above specified. The Contractor may, however, reclassify the Employee to higher pay rate classification, but no payment of salary or wages will be made at such higher rate



until, in the opinion of the Contractor, the Employee has demonstrated his ability to perform the duties of the higher classification. At any time thereafter the Contractor may terminate such reclassification and return the employee to his original classification or equivalent thereof, whereupon the Employee shall be returned to his original rate of pay.

#### 4. Term of Employment

The term of the Employment Contract shall be the period during which the Contractor desires the services of the Employee in connection with construction or other work in Iraq; provided, however, that after twenty-four (24) months continuous employment from date of arrival of the employee at the jobsite, the Employee may terminate his employment hereunder by giving the Contractor written notice specifying the date on which he desires to terminate his employment which date shall not be less than fifteen (15) days after the date of delivery of notice to the Contractor; further provided that if, in the opinion of the Contractor, the services of the Employee are no longer required, this Contract shall, at the option of the Contractor, thereupon terminate; and further provided that in the event the Contractor's construction contract is completed or terminated before the expiration of said period, the Employment Contract shall thereupon terminate and the Contractor shall only be obligated to pay the Employee for services rendered to the date of such termination or completion and salary during the return trip to the United States as provided in

Section 6, and return travel expense as provided in Section 7(a).

5. Salary Payments and Other Compensation

(a) The Employee is employed at the monthly rate inserted above, payable as follows:

(1) Not less than the equivalent of twenty-five (\$25.00) dollars per month to be paid in Dinars (ID), at the jobsite, at the legal rate of exchange, it being expressly understood and agreed that in no event may the Employee exchange dollars into Dinars (ID) at other than the then current legal rate of exchange.

(2) The balance to be paid in the United States in lawful money of the United States of America.

(3) All salary shall be paid to the Employee once a calendar month following the end of the month in which said salary shall have been earned and the Iraq payrolls therefor shall have been received at the Contractor's United States office. Salary payments shall be subject to deduction of any indebtedness due to the Contractor by the Employee, including all deductions required by law, all deductions expressly provided for herein, and all deductions authorized by the Employee.

(b) If the Employee shall absent himself from his work or duties without just cause, as determined by the Contractor, he shall not be entitled to any salary, vacation credit or completion-term-of-service bonus for any such day or days of absence. For each

such day of absence 1/26th of the Employee's monthly salary will be deducted. Computations for all other purposes shall be based on the number of days in the particular calendar month or months.

(c) The Employee shall work such hours and shifts as may be required by the Contractor and any days off shall be so designated by the Contractor from time to time. Salary at the monthly rate inserted above shall be the whole salary agreed upon for the entire period of service under this Contract and payment to and acceptance thereof by the Employee shall constitute a full release to the Contractor.

(d) If the Employee complies with the provisions of Section 4 hereof, a vacation allowance of one (1) day for each twelve (12) calendar days employed at the jobsite will be granted to him. Such vacation payments will start on the date of termination of salary payments hereunder, and shall be at the Employee's average rate of pay during the period in which such vacation allowance accrues, excluding board and lodging or any allowance in lieu thereof.

## 6. Travel Pay

Travel pay will accrue while the Employee is en route, on direction of the Contractor, from the point of hire to the site of the work, on the return trip from the site of the work to the point of hire, and while awaiting transportation at the site of the work, or any point intermediate between the point of hire and the site of the work, or return. Such

travel pay shall be paid on the basis of the Employee's monthly salary rate. Travel pay shall not accrue during stopovers resulting from the Employee's voluntary act or disregard of the Contractor's instructions, or during deviations made for the Employee's personal convenience.

## 7. Transportation and Travel Expense

(a) Transportation—Except as provided in Sections 11 and 17, the Contractor shall furnish or pay for transportation from the point of hire to the site of the work, and, upon compliance with the provisions of Section 4 hereof, or upon medical release, as provided in Section 9 hereof, return to the point of hire. Transportation shall be by such method (air, rail, automobile or water), class, schedule and route as the Contractor shall designate or approve. If the Contractor authorizes the Employee to furnish any part of his transportation, reimbursement therefor will be made to the extent authorized upon the presentation by the Employee of such evidence of expenditure as the Contractor may require.

(b) Baggage—The Contractor shall pay the cost of transporting by the most economical and direct route not to exceed 350 pounds of personal baggage from the point of hire to the site of work and, on compliance with Section 4 hereof, return thereof to point of hire.

(c) Per Diem—The Contractor will pay a per diem for each day during which the Employee is in travel status pursuant to Section 6. Said per diem

shall be deemed payment of all expense, including without limitation, meals, laundry, room and tips, but excluding transportation, and shall be in the amount of \$1.00 per day while traveling by boat, and \$10.00 per day inside the United States, or \$10.00 per day outside the United States, while traveling by any other carrier and during periods of layover, provided, however, that if the mode of transportation selected by the Contractor shall include meals at no cost to the Employee, or if the Contractor shall elect to furnish meals to the Employee while en route, without expense to the Employee, the per diem allowance herein provided for shall not be paid to the Employee. Any additional payments made by the Contractor for the account of the Employee in connection with such expenses shall be deducted from any payments due to the Employee under this Employment Contract. No per diem will be paid during stopovers or deviations resulting from the Employee's voluntary act or disregard of the Contractor's instructions.

#### 8. Jobsite Facilities

Board, lodging and medical services required for conditions resulting from the hazards of the employment will be furnished by the Contractor at the site of the work without cost to the Employee. The Employee shall use the facilities in regard to board, lodging and such medical services furnished by the Contractor unless the Employee is given a cash allowance in lieu of being furnished board and lodging, at the Contractor's option.



9. Compensation for Disability or Death Due to Accident

(a) The Contractor will provide by insurance for securing payment of benefits to the Employee or his dependents under the provisions of the Workmen's Compensation Act of the State where the Employee is hired.

(b) Any wage payment made to the Employee for a period during which he is entitled to Workmen's Compensation benefits by reason of temporary total, permanent total, temporary partial, or permanent partial disability shall be deemed an advance payment of compensation insurance benefits due the Employee, but only to the extent of such benefits due for the period of disability during which wages are paid.

(c) Should the health of the Employee become so impaired during employment hereunder as to justify the Contractor, in its opinion and based upon such medical examination as the Contractor may require, returning the Employee to the point of hire, by reason of injuries or illness arising out of and in the course of employment under this Employment Contract and through no fault of the Employee, the Employee will be returned to such point of hire at the Contractor's expense as herein provided. In such event, the travel pay and per diem provisions hereof shall remain applicable until the Employee is returned to the point of hire, or, if the Employee does not proceed to the point of hire, until returned to the point of hire, or, if the Em-

ployee does not proceed to the point of hire, until returned to the continental United States, at which time all obligations of the Contractor hereunder (except with respect to the payment of Workmen's Compensation Insurance benefits, if applicable), shall cease.

#### 10. Return Transportation Fund

(a) The Contractor may withhold as a return transportation fund, \$300.00 per month from the Employee's monthly earnings until a reserve of \$900.00 shall have been set aside, which fund shall be paid to the Employee upon the completion of twenty-four (24) months' service hereunder; provided further, that if the Employee quits or is discharged for cause prior to the completion of said period of service, then all monies due the Employee at the time of quitting or discharge shall be added to and become a part of said return transportation fund.

(b) If the Employee quits or is discharged for cause prior to the completion of said period of service, the Contractor may apply such fund to the payment on behalf of the Employee of his costs of living, transportation and other expense incidental to the Employee's return to the United States; and any part of said fund not so used shall be paid over to the Employee. If this Employment Contract is terminated by the Contractor prior to the completion of said period of service for reasons other than those covered by Sections 11 and 17, the fund shall be paid to the Employee upon such termination.

## 11. Termination of Employment

If, prior to the completion of twenty-four (24) months' continuous service hereunder, the Employee quits or this Employment Contract is terminated by the Contractor for cause, all salary, travel allowance and other payments and compensation shall cease as of the time of quitting or discharge, and the Employee shall thereafter be liable for and shall pay his own costs of living and his own return transportation cost and expense, and no further obligation shall exist on the part of the Contractor to the Employee. Termination for cause shall include, but not be limited to, the following: lack of ability of the Employee to perform the work of the classification for which he is hired; bad temper; the immoderate use of alcoholic drinks; the use of narcotics; the contraction or recurrence of venereal disease; carelessness, insubordination; incompetence; failure to travel as scheduled by the Contractor; failure or refusal to work; trading in currencies other than through established official channels; any misrepresentation or concealment of a material fact for the purpose of securing this Contract, or in connection with any medical examination relating to it; request by the government or the party for whom the Contractor is operating, that the Employee be dismissed; subversive activity; or any other act of misconduct.

## 12. Medical Examination

(a) Before departure from the point of hire or from the port of embarkation, the Employee shall

submit to physical examination, vaccinations and inoculations as may be required by the Contractor. It is expressly understood that all statements made by the Employee in connection with such examination shall be deemed material to and a part of the Employment Contract, and any misrepresentation by the Employee in such statements shall relieve the Contractor from any obligation under this Employment Contract. If the Employee does not, prior to departure from the port of embarkation, undergo at his own expense such dental or medical treatment as may have been prescribed upon any physical examination provided for herein, this Employment Contract may be terminated for cause.

(b) The Employee shall secure all necessary permits and papers required for his departure from the United States. All incidental preliminary expenses such as medical examinations, passport, visas, vaccinations and photographs will be paid for by the Contractor upon the Employee's submitting such evidence of payment as may be required by the Contractor.

### 13. Working Conditions

(a) The Employee understands that persons with or without union affiliations may be employed on the work, and agrees that this practice will not affect his obligations under this Employment Contract.

(b) The Employee may be required to instruct, direct and work with native labor, which circum-

stances shall not entitle the Employee to a foreman's or other supervisory classification.

(c) The Employee shall respect and obey all Iraq laws, rules and regulations and shall never interfere with the Iraq political or religious affairs either directly or indirectly, and shall comply with such other rules and regulations as the Contractor may establish from time to time with respect to the personnel employed by the Contractor. The Employee agrees to work and live in harmony with his coworkers employed on the work, and at all times to conduct himself in an orderly manner, with due regard to the comfort and convenience of his coworkers. The Employee shall not engage directly or indirectly, in any other employment, service or business whatever, nor shall he take part in local politics.

#### 14. Claims

The Employee agrees that he will, within thirty (30) days after any claim (other than a claim for compensation insurance) arises out of or in connection with the employment provided for herein, give written notice to the Contractor of such claim, setting forth in detail the facts relating thereto and the basis for such claim, and that he will not institute any suit or action against the Contractor in any court or tribunal in any jurisdiction based on any such claim prior to six (6) months after the filing of the written notice of claim hereinabove provided for, or later than two (2) years after such filing. Any action or suit on any such claim shall



not include any item or matter not specifically mentioned in the proof of claim above provided. It is agreed that in any such action or suit, proof by the Employee of his compliance with the provisions of this Section shall be a condition precedent to any recovery under this Employment Contract.

### 15. Personal Property

(a) The Employee shall provide all clothing and personal effects necessary to enable him to perform this Employment Contract. An inventory of clothing and other effects shall be prepared by the Employee and submitted to the Contractor before the Employee embarks from the United States, which inventory shall contain an itemized valuation of the articles listed thereon.

(b) The Contractor shall be responsible for the loss or damage to the Employee's clothing or personal effects while in transit by a public or common carrier, or while being transported by company operated transportation. At all other times during the term of the Employment Contract, the Contractor shall not be responsible for the loss of or damage to the Employee's clothing or personal effects, except where such loss or damage results solely and only from fire, storm or other catastrophe. In no event shall the Contractor be responsible for the loss or destruction of clothing and personal effects beyond a total valuation of \$200.00, nor beyond the inventory and valuation set out by the Employee, as provided in Section 15(a) hereof, which ever may be the lesser.

## 16. Disposition of Employee's Remains

In the event of the death of the Employee while outside the continental limits of the United States during the term of this Contract, the Employee hereby authorizes the Contractor to make appropriate disposition, as shall be deemed best by it under prevailing circumstances, of the body and personal effects of the Employee.

## 17. Disclosure of Information

The Employee is charged with knowledge that disclosure of any information to any person not entitled to receive it, or failure to safeguard any such information that may come within his knowledge, may subject him to immediate dismissal for cause.

## 18. Personal Income Tax

Personal income tax will be assessed on each Employee's earnings by the Government of Iraq in accordance with the tax laws of Iraq. The Contractor will withhold monies from each Employee's earnings every month in an amount which complies with the aforesaid tax laws.

## 19. Final Settlement

On the termination of the Employment Contract and payment to the Employee of all amounts due him hereunder, the Employee shall execute and deliver to the Contractor upon a form prepared by it, a receipt for said sums and a release of all claims,

except such claims as may have been submitted pursuant to the provisions of Section 14 hereof, and which may remain unsettled. It is understood that in preparing the final record of employment on termination, the Employee shall submit to such physical examination, both at the jobsite and after his return to the United States, as the Contractor may deem necessary for the preparation of such record herein required.

## 20. Extent of Agreement

The Employee certifies to the Contractor that he has read the foregoing Employment Contract, that he fully understands its terms and conditions, that the foregoing terms and conditions constitute his entire agreement with the Contractor, that no promises or understandings have been made other than those stated above, and it is specifically agreed by the parties hereto that this Employment Contract shall be subject to modification only by written instrument signed by both the Contractor and the Employee.

This Employment Contract executed by the parties named herein as of the date first specified at San Francisco, California, United States of America.

MORRISON-KNUDSEN  
LIMITED,

/s/ [Indistinguishable.]

/s/ DOROTHY CURCELL,

Witness.

Employee's Signature:

/s/ V. L. PROST.

/s/ W. F. BUSCHING,  
Witness.

[Endorsed]: Filed March 11, 1958.

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[Title of District Court and Cause.]

### NOTICE OF MOTIONS

To Valle Lawrence Prost and to Maxwell Keith,  
His Attorney:

Please Take Notice that the undersigned will bring Motions to Dismiss Complaint, for Summary Judgment and to Strike, on for hearing before the Law and Motion Department of the above-entitled Court in the United States Courthouse and Post Office Building, 7th and Mission Streets, San Francisco, California, on Monday the 9th day of June, 1958, at 9:30 o'clock a.m. or as soon thereafter as counsel can be heard.

DOUGLAS B. HUGHMANICK,  
EDWARD J. RUFF,  
THELEN, MARRIN, JOHNSON  
& BRIDGES,

By /s/ DOUGLAS B. HUGHMANICK.

Receipt of Copy acknowledged.

[Title of District Court and Cause.]

MOTIONS TO DISMISS COMPLAINT, FOR  
SUMMARY JUDGMENT AND TO STRIKE

Defendant Morrison-Knudsen Limited, a corporation, appearing specially herein, and only for the purpose of this action, and for no other purpose whatsoever, and not intending to submit to the jurisdiction of the United States of America or the State of California, or of this Court, except for the purposes of this action only, and not intending in submitting to jurisdiction for the purposes of this action to do business in the United States of America or the State of California, or otherwise bring itself within the jurisdiction of this Court, moves the Court to dismiss the above-entitled action on the following grounds:

I.

Said Complaint, and each of the causes of action thereof, fails to state a claim upon which relief can be granted.

II.

Said Complaint, and each of the causes of action thereof, fails to state a claim upon which relief can be granted in that the written notice of claim required by Section 14 of the written contract upon which said causes are based, attached as Exhibit A to said Complaint, is not alleged to have been given.

III.

Said Complaint fails to state a claim within the jurisdiction of the court in that claims made in



paragraphs IV of the Second and Third Causes of Action thereof for the sum of \$8,670 are for plaintiff's salary for the uncompleted portion of the contract term, whereas, Section 4 of said contract provides that defendant may terminate plaintiff's term of employment at any time it desires; the amount remaining in controversy is less than \$3,000 exclusive of interest and costs.

### Motion for Summary Judgment

Said defendant further moves the court for entry of Summary Judgment for said defendant in respect to the Third Cause of Action of said Complaint on the following grounds:

#### I.

Said Complaint, and each of the causes of action thereof, is based upon a purported breach by defendant of a written Employment Contract, a copy of which is attached to plaintiff's Complaint as Exhibit A. As is shown by the affidavit of Douglas B. Hughmanick on file herein, and the deposition of plaintiff Valle Lawrence Prost, the oral "promise" alleged in the Third Cause of Action of said Complaint was made in connection with oral negotiations made prior to and in contemplation of the execution by plaintiff and defendant of the written Employment Contract, and said oral "promise" cannot properly be made the basis of a claim distinct or separate from that made in the Second Cause of Action upon the written contract. Accordingly, defendant's motion for Summary Judgment

ment in respect to the Third Cause of Action of the Complaint should be granted.

### Motion to Strike

Said defendant further moves the court to strike the following allegations of said Complaint on the grounds that said allegations are immaterial.

(1) The words "for a period of two years or until the construction job at Basrah, Iraq, was completed" appearing in paragraph II of the Second Cause of Action of said Complaint at lines 22 and 23 of page 2 thereof.

(2) The words "the sum of \$8,670 together with interest thereon at the rate of 6% per annum from and after September 20, 1957, as plaintiff's salary for the uncompleted portion of his contract" appearing in paragraph IV of the Second Cause of Action thereof at lines 3, 4 and 5 of page 3 of the Complaint.

(3) All the allegations of paragraphs I, II, III and IV of the alleged Third Cause of Action of said Complaint.

Wherefore, said defendant prays as follows:

1. That the Complaint be dismissed or, in the alternative, that defendant's Motion to Strike be granted.

2. That summary judgment be entered for defendant in respect to the Third Cause of Action of said Complaint.

3. That defendant be awarded its cost herein incurred and such other and further relief as the court may deem proper.

Dated: May 8, 1958.

DOUGLAS B. HUGHMANICK,  
EDWARD J. RUFF,  
THELEN, MARRIN, JOHNSON  
& BRIDGES,

By /s/ DOUGLAS B. HUGHMANICK,  
Attorneys for Defendant.

[Endorsed]: Filed May 12, 1958.

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[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION  
FOR SUMMARY JUDGMENT

State of California,  
City and County of San Francisco—ss.

Douglas B. Hughmanick, being first duly sworn,  
deposes and says:

I am an attorney at law duly licensed and admitted to practice in all of the courts of the State of California and before the above-entitled court. I am associated with the law firm of Thelen, Marrin, Johnson & Bridges, attorneys for the defendant in this action.

On April 8, 1958, I took the deposition of plaintiff Valle Lawrence Prost. The original of the deposition is on file herein and it contains a true and correct transcript of the questions asked of the plaintiff and of his replies and answers to the same. The original of the deposition is on file herein and is, by this reference, incorporated herein as though set forth in full.

The plaintiff testified under oath during the taking of said deposition that his first contact with defendant was in June of 1956 when he called on one of the employees or representatives of the defendant for the purpose of obtaining employment. Subsequent to the time of this first meeting there were several additional meetings between plaintiff and employees of defendant.

The last such meeting was on July 6, 1956, at which time a written Employment Contract was signed by plaintiff whereunder he was employed subject to terms and conditions therein contained, to render services as a pile driver foreman for defendant in Iraq. A true copy of the contract is attached to plaintiff's Complaint as Exhibit A.

Three days after the meeting of July 6th, plaintiff departed for Iraq and, on his arrival there, rendered the services he was employed to perform until the termination of his employment on September 20, 1957.

During the meetings which occurred prior to the time the Employment Contract was signed, plain-

tiff testified that he was told by employees or representatives of defendant that if he accepted employment in Iraq he would be required to sign a written employment contract. Any and all statements or promises made to plaintiff in regard to the term of his employment were, by his own testimony, made prior to the time the written contract was signed and were made during negotiations and discussions which antedated the execution of the contract.

Plaintiff further testified that during the period of his employment in Iraq, the terms of his employment were governed by the written contract of employment and not by any oral promises made to him.

No statements or promises were made to plaintiff orally or in writing in regard to the term of his employment after the written contract of employment was signed.

Section 20 of said contract provides as follows:

“20. Extent of Agreement

“The Employee certifies to the Contractor that he has read the foregoing Employment Contract, that he fully understands its terms and conditions, that the foregoing terms and conditions constitute his entire agreement with the Contractor, that no promises or understandings have been made other than those stated above, and it is specifically agreed by the parties hereto that this Employment Con-



tract shall be subject to modification only by written instrument signed by both the Contractor and the Employee.”

/s/ DOUGLAS B. HUGHMANICK.

Subscribed and sworn to before me this 9th day of May, 1958.

[Seal] /s/ ABBY E. WIGNEY,  
Notary Public in and for the City and County of  
San Francisco, State of California.

My Commission Expires March 19, 1962.

[Endorsed]: Filed May 12, 1958.

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[Title of District Court and Cause.]

### ORDER GRANTING MOTION TO DISMISS

This matter having been argued, briefed and submitted for ruling,

It Is Ordered that defendant's motion to dismiss be, and the same hereby is, Granted.

/s/ GEORGE B. HARRIS,  
United States District Judge.

June 19, 1958.

Snyder vs. Bechtel International, No. 32714.

[Endorsed]: Filed June 19, 1958.

United States District Court for the Northern  
District of California, Southern Division  
Civil Action No. 37093

VALLE LAWRENCE PROST,  
Plaintiff,  
vs.

MORRISON-KNUDSEN LIMITED,  
Defendant.

ORDER OF DISMISSAL AND JUDGMENT

The motion of defendant herein for the dismissal of this action having heretofore been argued, briefed and submitted to the Court for ruling and it appearing to the Court that the jurisdiction of this Court is invoked upon the grounds of diversity of citizenship alone, and it appearing that damages equal to the amount of \$3,000 could not be proven under the allegations of the Complaint;

It Is, Therefore, Ordered, Adjudged and Decreed that the plaintiff's Complaint herein be and the same is hereby dismissed.

Dated: July 9th, 1958.

/s/ GEORGE B. HARRIS,  
United States District Judge.

Approved as to form:

/s/ MAXWELL KEITH,  
Attorney for Plaintiff.

THELEN, MARRIN, JOHNSON  
& BRIDGES,  
Attorneys for Defendant.

[Endorsed]: Filed July 9, 1958.

[Title of District Court and Cause.]

### NOTICE OF APPEAL

To the Clerk of the Above-Entitled Court:

Notice is hereby given that Valle Lawrence Prost, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of Dismissal and Judgment entered in this action on July 9, 1958.

/s/ MAXWELL KEITH,  
Attorney for Plaintiff.

[Endorsed]: Filed August 7, 1958.

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[Title of District Court and Cause.]

### DOCKET ENTRIES

1958

Mar. 11—Filed complaint and issued summons (jury demanded).

May 12—Filed notice & motion by deft. to dismiss, for summary judgment and to strike, June 9, 1958.

June 9—Hearing on motion for summary judgment. Further hearing continued to June 16, 1958.

June 16—Ordered after hearing, motion for summary judgment and to dismiss, submitted.

June 19—Filed order granting motion of defendant to dismiss.

1958

June 20—Mailed copies order to counsel.

July 9—Filed judgment and order dismissal.

Aug. 7—Filed notice of appeal by plaintiff.

Aug. 8—Mailed notices.

Aug. 14—Filed appellant's designation of record on appeal.

Sept. 12—Filed appeal bond in sum \$250.00.

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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorneys for appellant:

Excerpt From Docket Entries.

Complaint.

Notice and Motion to Dismiss, for Summary Judgment, etc., and Affidavit of D. B. Hughmanick, Order Granting Motion to Dismiss.

Order of Dismissal and Judgment.

Notice of Appeal.

Appeal Bond.

Designation of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 15th day of September, 1958.

[Seal]

C. W. CALBREATH,  
Clerk.

By /s/ MARGARET BLAIR,  
Deputy.

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[Endorsed]: No. 16188. United States Court of Appeals for the Ninth Circuit. Valle Lawrence Prost, Appellant, vs. Morrison-Knudsen Limited, Appellee. Transcript of Record. Appeal From the United States District Court for the Northern District of California, Southern Division.

Filed: September 15, 1958.

Docketed: September 22, 1958.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.



In the United States Court of Appeals  
for the Ninth Circuit

No. 16188

VALLE LAWRENCE PROST,

Appellant,

vs.

MORRISON-KNUDSEN LIMITED,

Appellee.

APPELLANT'S STATEMENT OF POINTS ON  
APPEAL AND DESIGNATION OF THE  
RECORD

STATEMENT OF POINTS ON APPEAL

Pursuant to Rule 17 (6) of the Rules of the above-entitled Court, the following is a concise statement of the points on which appellant intends to rely on its appeal herein:

1. The District Court erred in ruling that it had no jurisdiction of the subject matter in that the contract of employment between the parties allowed the defendant-appellee to limit its damages only to contract benefits and that plaintiff-appellant could not, as a matter of law, prove damages over Three Thousand Dollars (\$3,000.00).

In support of these points on appeal, appellant designates those portions of the record for printing

as are set forth in the attached Stipulation Re Designation of Record between the parties.

Respectfully Submitted,

/s/ MAXWELL KEITH,  
Attorney for Plaintiff-Appel-  
lant.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 22, 1958.

No. 16,188  
United States Court of Appeals  
For the Ninth Circuit

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VILLE LAWRENCE PROST,	} <i>Appellant,</i>
vs.	
MORRISON-KNUDSEN LIMITED,	} <i>Appellee.</i>

Appeal from the United States District Court,  
Northern District of California,  
Southern Division.

OPENING BRIEF FOR APPELLANT.

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MAXWELL KEITH,  
111 Sutter Street,  
San Francisco 4, California,  
*Attorney for Appellant.*

FILED

JAN - 7 1959

PAUL P. O'BRIEN, CLERK



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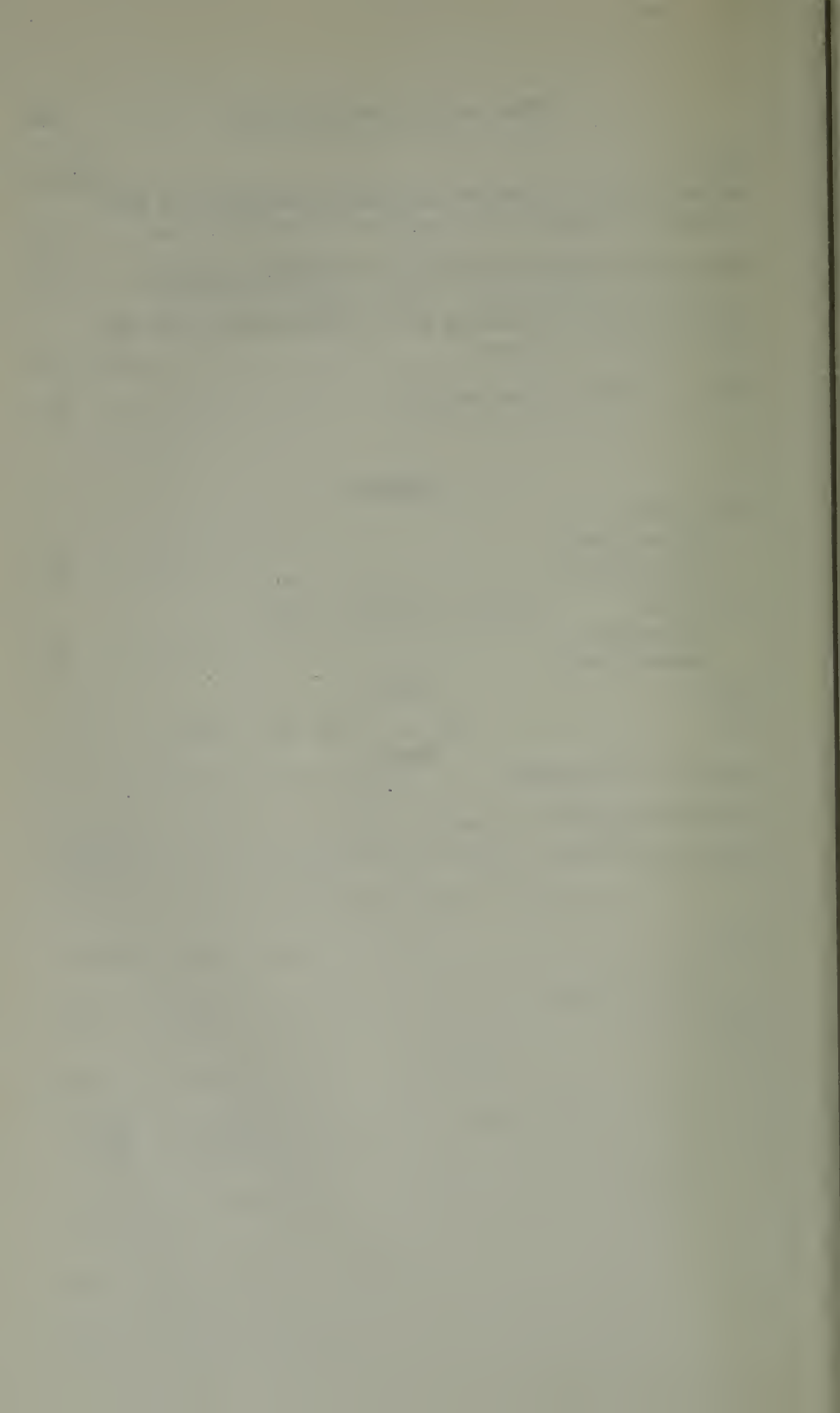
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No. 16,188

# United States Court of Appeals For the Ninth Circuit

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VALLE LAWRENCE PROST,

vs.

MORRISON-KNUDSEN LIMITED,

*Appellant,*

*Appellee.*

Appeal from the United States District Court,  
Northern District of California,  
Southern Division.

## OPENING BRIEF FOR APPELLANT.

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### STATEMENT OF JURISDICTION.

The complaint was filed on March 11, 1958 by a resident of the State of California against an Australian corporation, allegedly a wholly-owned subsidiary of Morrison-Knudsen Company, a Delaware corporation (R. 3, 4). The proceedings were thus instituted under 28 U.S.C.A. § 1332 which then provided as follows:

“(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$3,000 exclusive of interest and costs, and is between:

- (1) citizens of different States;
  - (2) citizens of a State, and foreign states or citizens or subjects thereof;
  - (3) citizens of different States in which foreign states or citizens thereof are additional parties.
- (b) The word 'States' as used in this section, includes the Territories and the District of Columbia, and the Commonwealth of Puerto Rico."

After the filing of the complaint the defendant moved to dismiss the causes of action specified in the complaint and for summary judgment as to the third cause of action. The District Court entered an order and final judgment in favor of defendant. From that judgment appellant has taken this appeal. The jurisdiction of this Court to review the final judgment below is sustained by 28 U.S.C.A. § 1291.

---

### STATEMENT OF THE CASE.

This action involves the disputed breach of an overseas contract of employment. The plaintiff-appellant filed a complaint alleging three causes of action over the contract of employment involved which is attached to the complaint (R. 7-20). The first claim for relief is an account stated to obtain the benefits withheld from him by the appellee under the terms of paragraphs 4, 6 and 7 of said contract. The second claim for relief is for breach of a written contract involving both the claimed benefits set forth in the first claim for relief and for damages flowing from the breach of the con-



tract. This was estimated on the basis of loss of salary for the period from the breach to the end of the alleged two-year contract. The third claim for relief is for the breach of an oral contract of employment between the parties. It alleges the same damages as claimed in the breach of the written contract in the second claim for relief.

The defendant below filed motions to dismiss the complaint, for summary judgment and to strike (R. 23-30). As to all three claims for relief, the defendants moved that the claims did not state a cause of action; that the plaintiff had not alleged the performance of Section 14 of the written contract, and that the claims were outside the jurisdiction of the federal courts as not involving a controversy of more than \$3,000.00. The appellee urged that the sum of \$8,670.00 could not support the court's jurisdiction since the contract was at will. The defendant below separately moved for summary judgment as to the third claim for relief on the ground that the written contract of employment governed the parties.

Argument was then had and the court below sustained the motions to dismiss on June 19, 1958 (R. 30). Thereafter an order of dismissal and judgment was entered dismissing the complaint on the ground that the federal court did not have jurisdiction of the controversy (R. 31). Plaintiff then duly appealed. Thus the issues raised by the ruling of the learned court below are: (1) Did the federal court have jurisdiction under 28 U.S.C.A. § 1332 upon the filing of a bona fide complaint for breach of contract which in-

volved the interpretation of said contract? (2) Even if the contract were interpreted against plaintiff-appellant at pretrial procedure, would such a ruling prevent plaintiff-appellant a trial before a federal jury?

The first claim for relief admittedly involved a sum which the appellee apparently does not contest would be paid if the trier of fact should determine that it wrongfully breached the contract attached to the complaint. The second claim for relief involves a dispute as to whether the plaintiff was employed for a period of two years. The third claim for relief involves a dispute as to the legality of the written contract and asserts that an oral contract existed between the parties regardless of the written contract which if breached would cause the defendant to be liable to the plaintiff in a sum exceeding \$3,000.00.

The plaintiff-appellant thus contends that the court below had jurisdiction of the controversy and the defendant-appellee contends that it did not.

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#### **SPECIFICATION OF ERRORS.**

1. The District Court erred in dismissing the plaintiff's complaint on the ground that it lacked jurisdiction over the controversy.

**ARGUMENT.**

- I. THE FEDERAL COURTS HAVE JURISDICTION OVER PLAINTIFF'S COMPLAINT SINCE IT INVOLVES A GOOD FAITH CLAIM FOR AN AMOUNT IN EXCESS OF \$3,000.
- A. Whether or not the plaintiff is entitled to damages in excess of \$3,000 involves a mixed question of law and fact as to the interpretation of the contract and the intention of the parties.
1. The District Court had jurisdiction to hear and determine plaintiff's allegations and its pretrial determinations did not oust the federal court of jurisdiction.

There can be little doubt that that record below showed the filing of a bona fide claim in good faith by plaintiff asserting a claim for over \$3,000.00. The parties are in a bona fide dispute over the terms of an employment contract, and the construction of it involves a matter of over \$3,000.00. First, it is admitted by the appellee that under paragraph 4 of the contract, it would be liable to at least the sum of \$2,470.00 if the contract was wrongfully breached. Second, the contract calls for the employment of plaintiff for two years at a monthly rate of \$900.00 (R. 7). Third, that the plaintiff, if correct in his contentions, would be entitled to approximately \$8,670.00 as the prima facie measure of damages lost by the breach of contract alleged.

The contract cannot be said, in a jurisdictional argument, to permit the defendant to assert that the plaintiff is not in good faith in asserting a claim for damages in excess of \$3,000.00.

1. The contract states in its wherefore clause that the defendant is engaged in a construction job for the Government of Iraq and desires to retain the services of plaintiff for work in connection with said construction (R. 8).

2. Paragraph 1 of said contract specifically refers to said construction project with the Government of Iraq and says that the contract is subject to it (R. 9).

3. Paragraph 4 (R. 10) of the said contract is the major provision in dispute. Appellee asserts that this provision makes the contract a contract terminable at the will of the defendant and limits its liability. Appellant asserts that this provision calls for his services for twenty-four months and that the defendant has the election to terminate the contract prior to said time only if it advances the monetary benefits of the contract with said election. That, further, if the defendant refuses to advance said benefits, the rights and duties of the parties are governed by Paragraph 11 of the contract (R. 17). As such, the defendant must prove "good cause" and that if the plaintiff proves lack of good cause and breach that the damages flowing from such lack of good cause can easily exceed \$3,000.00.

It is respectfully asserted that for jurisdictional purposes this contract clearly involves a dispute over a twenty-four-month contract involving salary of \$900.00 a month. Paragraph 4 clearly provides for a twenty-four-month period in its very terms. And the twenty-four-month period is set forth in Paragraphs 10 and 11.

So it is that the plaintiff's complaint cannot be dismissed on jurisdictional grounds.

The rule is stated in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 1938, 303 U.S. 283, 288-290, 58 S.Ct. 586, 590:



“The intent of Congress drastically to restrict federal jurisdiction in controversies between citizens of different states has always been rigorously enforced by the courts. The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls, if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. The inability of plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction. Nor does the fact that the complaint discloses the existence of a valid defense to the claim. But if, from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed. Events occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction.”

In *Lilienthal v. M'Cormick*, 9th Cir., 1902, 117 Fed. 89, this court has held that the jurisdiction of the federal courts did not depend on the construction given by the courts on a contract when the complaint alleged in good faith damages in excess of the then jurisdictional amount of \$2,000.00.

In this case the complainants had sued for the recovery of \$3,451.00 under a contract for the sale of hops. The complainants had advanced the sum of



\$1,051.00 on the contract but contended that they had a lien on the entire crop of hops. The lower court held that the complainants had a lien interest only to the extent of their advances. On appeal, testing the jurisdiction of the federal courts, this court stated, 117 Fed. 95:

“The amount in controversy exceeded \$2,000, exclusive of interest and costs, and this amount was sufficient to give the court jurisdiction over the cause. The suit was brought, not only to recover the amount of money advanced by complainants, viz., \$1,051, but also for damages in the sum of \$2,400, making a total of \$3,451. It makes no difference, in so far as the question of jurisdiction is concerned, that the court in its decree held that the contract only afforded a security for the amount advanced, and could not be construed as giving a lien for the damages. It is the amount claimed in the bill of complaint, and not the amount recovered, that furnishes the test of jurisdiction. As was said by the court in *Peeler v. Lathrop*, 1 C.C.A. 93, 99, 48 Fed. 780, 786: ‘The amount in dispute, or matter in controversy, which determined the jurisdiction of the circuit courts in suits for the recovery of money only, is the amount demanded by plaintiff in good faith.’ ”

See, also:

*Schunk v. Moline, Milburn & Stoddard Co.*,  
1893, 147 U.S. 500, 13 S.Ct. 416;

*Erickson v. Allstate Insurance Company*, S.D.  
Cal., 1954, 126 F. Supp. 100, affirmed 227 F.  
2d 755;

*Prejean v. Delaware-Louisiana Fur Trapping  
Co.*, 5th Cir., 1926, 13 F. 2d 71.

II. THE REASONABLE CONSTRUCTION OF THE CONTRACT OF EMPLOYMENT IS THAT THE DURATION OF THE CONTRACT IS FOR A TERM OF TWO YEARS OR UNTIL THE COMPLETION OF THE CONSTRUCTION JOB SUBJECT TO TERMINATION PRIOR TO SAID TIME BY THE EMPLOYER IF HE PAYS THE EMPLOYEE HIS TERMINATION BENEFITS OF IF HE ELECTS TO DEFEND ON THE GROUND THAT (a) THE EMPLOYEE QUIT OR (b) THAT THE EMPLOYEE WAS FIRED FOR CAUSE.

A. A contract requiring a citizen to travel thousands of miles to do work on a particular construction project for twenty-four months, which is written by the employer, which contains alternative provisions and which indicates to the reasonable man a two year period of employment is to be interpreted under all of its terms and meanings and not by one single phrase.

1. The defendant only had an election of remedies to cancel at will with the payment of contract benefits or to defend a breach of contract action.

The defendant asserts that the phrase in Paragraph 4 of the contract of employment (R. 10) that:

“The term of the Employment Contract shall be the period during which the Contractor desires the services of the Employee in connection with construction or other work in Iraq; . . .”

governs both the jurisdictional argument and arguments on the merits that its liability is limited to less than \$3,000.00 as a matter of law. Plaintiff asserts that this single sentence is directly tied to (a) the construction job with the Government of Iraq or (b) the twenty-four-month period. This phrase is expressly qualified by the fact that the employee must work for 24 months; that if in the opinion of the contractor the services of the employee are no longer required, the contract, *at the option of the contractor*, shall terminate, and what is exceedingly significant, further provides that in the event the contractor's

construction contract is completed or terminated before the expiration of *said period* (R. 10) the employment contract shall terminate and the contractor shall only be obligated to pay the employee for services rendered to the date of such termination or completion and salary during the return trip to the United States as provided in Section 6 and return travel expense as provided in Section 7(a). "Said period" obviously refers to the construction project completion or twenty-four months.

Elementary rules of contract construction, it is respectfully asserted, clearly militate against any other construction than that the contract of employment is for a term of twenty-four months subject to an optional termination on condition that (1) the construction project with the Government of Iraq was completed or (2) the contractor pays the employee the termination benefits of the contract.

1. In the interpretation of a written contract it is fundamental that the instrument must be examined as a whole.

12 Cal. Jur. 2d 331-333.

As such, Paragraph 4 must be construed as a whole and must be construed with Paragraphs 1, 10 and 11, which all indicate that the parties were looking for a two-year period of employment or until the construction project was completed.

2. The language of a contract is to be construed against the maker of the contract, in this instance, the employer.

Civ. Code Cal. § 1654;

*RKO v. Sheridan*, 195 F. 2d 167;

*Crillo v. Curtola*, 91 C.A. 2d 263;

*Pacific Lumber Co. v. I.A.C.*, 22 C. 2d 410.

3. A construction that would make an agreement reasonable, fair and just is preferred to one that, though equally consistent with the language, would make the contract unreasonable and unfair.

12 Cal. Jur. 2d 341;

Civ. Code Cal. § 1643.

It would appear especially determinative that the parties here knew that there was a vast construction job to be done in Iraq, that this job was to take probably two years to complete, and that the plaintiff here undertook to travel to Iraq under what clearly appeared to be a two-year contract. The employment contract here by special reference to the construction project, by its constant reiteration of the twenty-four-month period and by the alternative provision of Paragraph 11, is manifestly subject to the reasonable construction that both parties contemplated that this contract was to last for two years or until the construction project was terminated.

A similar contract is noted in *Olsen v. Arabian American Oil Co.*, 2nd Cir., 1952, 194 F. 2d 477. This case held that an overseas employer could terminate its contract without further liability by the payment of the stipulated benefits, "for the company was required to pay an additional consideration for the exercise of that option" (*id.*, at 479).

Here, of course, the complaint clearly disclosed that the employer refused to pay the additional consideration necessary for the exercise of the option of ter-



mination. That case also cites us to *Carter v. Bradlee*, 1935, 280 N.Y.S. 368. Here the court stated at 280 N.Y.S. 370:

“This contract, however, contained the following provision: ‘This Agreement is made for two years from November 1st, 1925, but it is understood and agreed that we retain the right to terminate this Agreement and to discharge you at any time, should we feel called upon to do so for any reason.’

It is contended by the defendants that the trial court properly decided that under the foregoing provisions the plaintiff could be discharged at any time. We adopt a different view. Such a construction would make the contract merely one at the defendants’ will, though by its terms it was for two years. A construction will not be given to a contract, if possible, that would place one of the parties at the mercy of the other. *Simon v. Etgen, et al.*, 213 N.Y. 589, 107 N.E. 1066. Under the clause in question, we are of the opinion that any discharge before the expiration of a year should have some ‘reasonable’ ground and that the reason must be attended with good faith. (Citing New York cases.)”

It is respectfully asserted therefore that the necessary corollary to the *Olsen* case is that the contract here is subject to the reasonable interpretation that the appellee has written a contract containing alternative provisions. It promised the plaintiff employment for twenty-four months. It could terminate this contract upon the payment of the benefits of the contract. If it chooses not to pay the benefits, it has



elected to operate under the provisions of Paragraph 11, and upon the proof that the contract was not terminated "for cause" under its provisions, it is liable for all damages flowing from the breach of a twenty-four-month employment contract. It cannot now elect to treat this contract as terminable at will without having fulfilled its own promises. In *Nattini v. Dewey*, 96 C.A. 2d 545, 548-549, the court stated:

"The contract provided that 'the term hereof *may* be sooner terminated (upon two weeks notice to Nattinis) in the event continued operation of the club is found to be impractical.' That language granted appellants an election to terminate. It did not mean that termination would automatically result from the occurrence of the anticipated condition. The language clearly implied that notice was the *sine qua non* to the termination of the employment. Since the termination was dependent upon the choice of appellants, their privilege not having been exercised in the prescribed manner, there was no intention, choice or preference indicated in order to effect such termination and there was none."

4. California precludes the summary dismissal of an action involving the construction of a contract which is susceptible of alternative interpretations. In *Walsh v. Walsh*, 18 Cal. 2d 439, the Supreme Court of California reversed a summary judgment ruling in favor of the defendant after the lower court had held that the construction of the contract was subject to summary judgment. The Supreme Court stated at 443:

“When a contract is in any of its terms or provisions ambiguous or uncertain, ‘it is primarily the duty of the trial court to construe it *after a full opportunity afforded all the parties in the case to produce evidence of the facts, circumstances and conditions surrounding its execution and the conduct of the parties relative thereto.*’ (Barlow v. Frink, 171 Cal. 165, 172, [152 Pac. 290].)” (Italics added.)

And at 444:

“When the meaning of the language of a contract is uncertain or doubtful and parol evidence is introduced in aid of its interpretation, *the question of its meaning is one of fact . . .*” (quoting *Scott v. Sun Maid Raisin Growers Assn.*, 13 C.A. 2d 353).

- B. The appellee cannot stand on a repudiated promise in limiting its damages.
1. An unexercised option to terminate cannot limit damages under a jurisdictional argument or upon the merits.

The measure of damages for wrongful discharge of an employment contract is the unpaid remainder of the amount of salary agreed on for the entire period of service, less the amount the employee has earned or with reasonable effort might have earned in other employment. The contract price furnishes the prima facie measure of recovery, and the burden is on the employer to show that the actual loss was less. 32 Cal. Jur. 2d 483. Manifestly, the breach of the contract involved herein would make the appellee prima facie liable for the loss of benefits deprived the appellant

by the wrongful discharge prior to the completion of the construction project with the Government of Iraq or prior to the twenty-four-month period.

It would appear completely contrary to justice to permit the appellee here to urge that damages are limited by the provisions of Paragraph 4, to the withheld benefits, when it has elected not to terminate the contract under this provision. Appellee has withheld benefits to the appellant and has sought to treat this action as though it had in fact paid said benefits. But as set forth in *Prudential Insurance Co. v. Faulkner*, 10th Cir., 1934, 68 F. 2d 676, 679:

“One who repudiates his obligation under a contract cannot thereafter exercise an election contained in its provisions. Having assumed and still maintaining that attitude, the company waived its right to elect between the alternative methods of payment and thereupon became liable for the full amount in one sum.”

See, also:

*Nattini v. Dewey*, supra.

In *Ramsey v. Rodgers*, 60 C.A. 781, the court held that the invalidity of clause calling for the payment of liquidated damages, assumed to be void, did not prevent the employee from gaining all damages suffered upon breach of the contract by the employer. Thus the stipulated contract benefit to be paid upon the exercise of an option to cancel did not determine the amount of damages which could be recovered upon the breach of the contract.

The record thus discloses that the plaintiff filed a bona fide complaint for the breach of a contract of employment involving a controversy in excess of three thousand dollars. The appellee has sought to oust the jurisdiction of the federal courts by claiming that the contract was for an at will term and that the appellant could not recover damages in excess of his benefits which would have been paid had appellee elected to treat the contract as terminated.

But clearly the law does not allow a party to claim the advantages of a repudiated promise. Appellant is therefore entitled to a trial to determine whether or not the appellee breached the contract of employment with him. At such a trial the appellee cannot claim the benefits of Paragraph 4 which it has disavowed. And even if the court below was correct in interpreting appellant's action as limited by Paragraph 4, such a decision did not oust the federal court of jurisdiction. The appellant in good faith has claimed damages in excess of eleven thousand dollars, and the court had exercised federal jurisdiction in making a determination as to the construction of the contract in bona fide dispute.

---

### CONCLUSION.

It is respectfully prayed that a judgment be rendered reversing the judgment below.

Dated, San Francisco, California,  
January 5, 1959.

MAXWELL KEITH,  
*Attorney for Appellant.*

No. 16189. ✓

16190 ✓

IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

MRS. GRACE CARRIGAN,

*Appellant,*

*vs.*

CALIFORNIA STATE LEGISLATURE and INDUSTRIAL ACCI-  
DENT COMMISSION OF THE STATE OF CALIFORNIA and  
ZENITH NATIONAL INSURANCE COMPANY and DR. F.  
K. AMERONGEN,

*Appellees.*

---

**APPELLEES' BRIEF.**

---

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No. 16189.  
IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

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MRS. GRACE CARRIGAN,

*Appellant,*

*vs.*

CALIFORNIA STATE LEGISLATURE and INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and ZENITH NATIONAL INSURANCE COMPANY and DR. F. K. AMERONGEN,

*Appellees.*

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**APPELLEES' BRIEF.**

---

**Statement of Case.**

On May 22, 1958, appellant, appearing *in propria persona*, filed a 188-page complaint in the above-entitled action in the United States District Court, Southern District of California, Central Division, naming the California State Legislature, the Industrial Accident Commission of the State of California, Zenith National Insurance Company and Dr. F. K. Amerongen as defendants. On July 14, 1958, appellant filed a document which she denominated "Application for Injunction Against California State Legislature and Industrial Accident Commission of the State of California and for Immediate Payment of All Equitable Relief Prayed for in the Complaint in This Action." The several appellees appeared and moved for dismissal of said complaint. The motions to dismiss the complaint were granted in a minute order entered by the

District Court on July 21, 1958. The minute order states as grounds therefor:

"1. That the complaint fails to comply with Rule 8 (a) (2) of the Federal Rules of Civil Procedure which provides that plaintiff shall file a short and plain statement of the claim showing that the pleader is entitled to relief.

"2. That the complaint does not comply with Rule 8 (a) (1) of the Federal Rules of Civil Procedure in that it does not contain a short and plain statement of the grounds upon which the court's jurisdiction depends.

"3. That Mrs. Grace Carrigan has no standing in court as the wife of the injured person; and if she is attempting to represent her husband as an attorney or otherwise, she lacks standing before the court."

The District Court in said minute order further held that it had no jurisdiction and that the application for injunctive relief and for a three-judge court must be denied.

On August 5, 1958, appellant filed the instant appeal in a document entitled "Application to Appeal in a Special Manner." It appears that the appeal is taken from the order of the District Court dismissing the complaint without prejudice, and from the denial of the application for injunctive relief and for a three-judge court.

### Statement of Facts.

The complaint is unintelligible, ambiguous, and uncertain but it appears that the legally pertinent facts as set forth in the complaint are as follows:

In the year 1956 appellant's husband, Mr. Milo Carrigan, earned \$5,799.30 as a hodcarrier. On May 27, 1957, he sustained an industrial injury. [Complaint p. 21.]



Appellee Zenith National Insurance Company paid Workmen's Compensation benefits in the amount of \$40 per week, and furnished medical care for a period of time. [Complaint p. 21.] Appellee Dr. Amerongen was one of the treating physicians authorized by Zenith National Insurance Company to attend Mr. Carrigan. [Complaint p. 76.]

Certain disputes arose between the insurance company and appellant regarding medical treatments and the amount of the benefits.

The appellant, Mrs. Carrigan, contacted the attorneys for the Industrial Accident Commission and was informed that Mr. Carrigan should make application to the Commission to settle the dispute. [Complaint p. 95.] Mr. Carrigan has never filed an application with the Commission.

### Statement of Issues.

Briefly summarized, appellant prays that the District Court declare unconstitutional and order deleted certain sections of the California Labor Code prescribing methods for computing benefits under the Workmen's Compensation Act, and that the District Court order the California State Legislature to enact certain legislation specified by appellant. [Complaint pp. 183-185.]

Appellant also prays for damages as follows:

1. \$10,000 from the State Legislature for having maintained a deficient, inequitable and fraudulent law and for having permitted appellees, Zenith National Insurance Company and Dr. Amerongen, to function under said law.

2. \$10,000 from the Industrial Accident Commission for having functioned under, enforced and upheld said deficient and inequitable and fraudulent law.

3. \$10,000 from appellee, Zenith National Insurance Company for not paying equitable compensation to appellant's injured husband and for ceasing, in a fraudulent manner, all benefits.

4. \$10,000 from appellee, Dr. Amerongen, for having been a party to the ceasing of the benefits.

5. Special damages of \$20,000 from Mr. S. W. Macdonald, chairman of the Industrial Accident Commission, for the closing sentence in his letter of January 8, 1958,, which was sent to appellant and her husband, which was cruel, inhuman and mocking.<sup>1</sup>

The legal issues may be framed as follows:

1. whether the complaint was properly dismissed without prejudice by the District Court, and more particularly, whether the District Court properly held that the appellant failed to file a short and plain statement of the claim showing that she was entitled to relief; that the complaint did not contain a short and plain statement of the grounds upon which the Court's jurisdiction depends; that appellant, Mrs. Carrigan, has no standing to sue as the wife of the injured person;

2. whether a single district judge may dismiss an application for injunction where it appears that the court has no jurisdiction.

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<sup>1</sup>"I regret I am unable to be of further assistance to you, and trust that your husband's health will improve as much as possible."  
[Complaint p. 154.]

## ARGUMENT.

### I.

Appellant's Claim for Relief Did Not Contain a Short and Plain Statement of the Claim Showing That the Pleader Was Entitled to Relief.

Rule 8(a)(2) of the Federal Rules of Civil Procedure provides in part that:

"A pleading which sets forth a claim for relief, . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief, . . ."

A complaint must contain a statement of facts showing the jurisdiction of the court, ownership of a right by plaintiff, violation of that right by the defendant, injury resulting to plaintiff by such violation, and justification for equitable relief where that is sought.

*Patten v. Dennis* (C. C. A. 9th, 1943), 134 F. 2d 137, 138.

Appellant's complaint consists of 188 pages of vague, ambiguous and unintelligible statements, setting forth in detail her conversations and correspondence with attorneys from the Industrial Accident Commission, the insurance company, and the doctors. Appellant's statements are neither short nor plain, and under no conceivable theory does she state a claim against any of the appellees.

The claim, if any, arises under the Workmen's Compensation Act (Cal. Labor Code, Div. IV) and belongs to appellant's husband, the injured party. His exclusive remedy is to file an application before the Industrial Acci-

dent Commission. California Labor Code, Section 5300, provides in part that:

“All the following proceedings shall be instituted before the commission and not elsewhere, except as otherwise provided in Division 4.

“(a) For the recovery of compensation, or concerning any right or liability arising out of or incidental thereto.

“(b) For the enforcement against the employer or an insurer of any liability for compensation imposed upon him by this division in favor of the injured employee, his dependents, or any third person.

. . .”

## II.

### **The Complaint Does Not Contain a Short and Plain Statement of the Grounds Upon Which the Court's Jurisdiction Depends.**

Rule 8(a)(1) of the Federal Rules of Civil Procedure provides that a claim shall contain a short and plain statement of the grounds upon which the court's jurisdiction depends.

The jurisdiction of federal courts is limited to that conferred by the Federal Constitution and statutes, so that facts disclosing jurisdiction must affirmatively appear upon the records.

*Patton v. Baltimore & O. R. Co.* (C. C. A. 3d, 1952), 197 F. 2d 732, 743.

Federal jurisdiction does not arise merely because an averment is made as to the existence of a constitutional question. Allegations that defendants' acts denied plain-

tiff benefits and rights granted him by the Fourteenth Amendment are mere conclusions.

*Swank v. Patterson* (C. C. A. 9th, 1943), 139 F. 2d 145, 146.

Appellant apparently contends that certain portions of the Workmen's Compensation Law of California are invalid on the theory that under this law her husband would not be able to receive the same amount of money in benefits which he was actually earning as a hodcarrier prior to the injury, and under the theory that the California Legislature and the Industrial Accident Commission "allowed" the insurance company and the doctor to cease providing medical benefits, and hence that she and her husband were deprived of certain property rights without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States.

The California State Legislature by enacting the Workmen's Compensation Act has created certain rights which did not exist at common law. If Mrs. Carrigan is dissatisfied with these rights her recourse is to the Legislature to change the statutes. There is no issue raised by the pleadings that appellant has been deprived of any rights. Appellant is entitled to enforce only those rights created by statute and in the manner prescribed by statute.

It is a well-settled rule of judicial administration that no one is entitled to judicial relief until he has exhausted all prescribed applicable administrative remedies.

The Industrial Accident Commission has complete control of controversies between employer and employees



arising under the Act, subject to the rules and regulations provided by the legislature, and resort to the courts may take place only in accordance with such rules and regulations.

*Bartlett Hayward Co. v. I. A. C.*, 203 Cal. 522, 535.

Mr. Carrigan has never filed an application with the Industrial Accident Commission to determine the disputes alleged in the complaint.

There is no allegation in the complaint that the law in question has been applied to the appellant to her detriment and there is no justiciable controversy where the object of an action is merely to determine the constitutional validity of legislation.

*Muskra v. United States*, 219 U. S. 346, 31 S. Ct. 250, 255.

It is clear that the judgment prayed for could not possibly be executed and would not terminate the action, and hence the Federal court should not entertain the action.

*Muskra v. United States*, 219 U. S. 346, 31 S. Ct. 250;

*Angell v. Schram* (C. C. A. 6th, 1940), 109 F. 2d 380, 382;

*Duart Mfg. Co. v. Philad Co.*, 31 Fed. Supp. 548.

### III.

#### Appellant Has No Standing to Sue.

Mrs. Carrigan, the appellant in the above-entitled action, is attempting to question the validity of certain portions of the Workmen's Compensation Act. It is

clear from the complaint that her husband sustained the industrial injury and that any rights which he may have under the Workmen's Compensation Act should be asserted by him in the proper forum.

Mrs. Carrigan may not in any event question the validity of a statute when her rights are not affected thereby and when the law is not about to be or has not been applied to her disadvantage.

*Premier-Pabst Sales Co. v. Grosscup*, 56 S. Ct. 754, 298 U. S. 226;

*Dallas Joint Stock and Land Bank v. Davis*, 83 F. 2d 322, 323.

#### IV.

Single District Judge Properly Dismissed the Complaint and Application for Injunctive Relief.

Single district judges may dismiss a complaint for want of jurisdiction where question of the unconstitutionality of a statute presented as a ground for an injunction lacks the necessary substance and no other ground of jurisdiction appears.

*Ex parte Poresky*, 54 S. Ct. 3, 4, 290 U. S. 30;

*Jacobs v. Tawes*, 151 Fed. Supp. 770, 771 (clearly appeared on face of complaint that the court did not have jurisdiction).

Subject to review, a trial judge may determine whether a case requires a statutory three-judge court.

*J. B. Schermerhorn, Inc. v. Holloman*, 74 F. 2d 265, 266, cert. den. 55 S. Ct. 548, 294 U. S. 721.

**Conclusion.**

For the foregoing reasons and authorities, it is submitted that the District Court properly dismissed the complaint in the above-entitled action, and it is respectfully requested that the judgment of dismissal be affirmed.

Respectfully submitted,

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No. 16,190 ✓

United States Court of Appeals  
For the Ninth Circuit

---

MRS. GRACE CARRIGAN,

*Appellant,*

vs.

SUNLAND-TUJUNGA TELEPHONE COMPANY,  
and STATE OF CALIFORNIA PUBLIC UTIL-  
ITIES COMMISSION,

*Appellees.*

BRIEF OF APPELLEE  
SUNLAND-TUJUNGA TELEPHONE COMPANY.

---

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No. 16,190

**United States Court of Appeals  
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MRS. GRACE CARRIGAN,

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vs.

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and STATE OF CALIFORNIA PUBLIC UTIL-  
ITIES COMMISSION,

*Appellees.*

**BRIEF OF APPELLEE**

**SUNLAND-TUJUNGA TELEPHONE COMPANY.**

---

**STATEMENT OF THE CASE.**

This case comes before this Court on appellant's appeal from orders of the United States District Court for the Southern District of California dismissing her complaint against appellees, Sunland-Tujunga Telephone Company (the "Company") and the Public Utilities Commission of the State of California (the "Commission"), on the ground that the complaint fails to state a claim upon which relief can be granted. Tr. 115, 117.

Appellant alleges in her complaint (Tr. 2) that the Company's charges for telephone services are unlaw-

ful even though they are based on the three rate schedules promulgated by the Commission. The first schedule, called "A-1," is for calls to certain prefixes in the Los Angeles Extended Area comparatively close to the subscriber's prefix. Such calls are billed on a flat rate basis. The second schedule is called "H-1" and is for calls to more distant prefixes within the Los Angeles Extended Area. They are what is commonly known as "message unit" calls. Such calls are billed on a fluctuating toll basis, depending upon the distance of the prefix called from the subscriber's prefix and the length of time of the call. Some calls under the H-1 rate cost more than twenty-four cents; some cost less, depending upon the distance and length of time of the call. Finally, there is the "B-1" schedule for long distance calls outside the Los Angeles Extended Area. The charge for such calls varies with the distance of the call and the length of time of the call, but is always in excess of twenty-four cents per call.

Appellant asserts in her complaint (Tr. 2) that when she was a subscriber of the Company it charged her less than twenty-five cents per call for a number of message unit (H-1) calls and that such charges were in violation of sections 4251-4254 of the Internal Revenue Code. She claims that, although the charges made by the Company were in conformance with the Commission's tariffs, all such message unit calls of less than twenty-five cents should have been included within the flat rate charge for A-1 calls. She further alleges that she refused to pay what she

deemed to be the unlawful part of her telephone charges and that because of such refusal to pay, her telephone was disconnected by the Company.

Appellant prays for specific relief against both appellees to require certain changes in the tariffs under which the Company operates and to require the restoration of her telephone service. She prays also for an injunction against both appellees to prevent them from enforcing the present tariff schedules promulgated by the Commission. Although she seeks to recover \$15,000 damages from the Company and \$30,000 in damages from the Commission, she does not allege facts showing any real monetary damages.

Both appellees moved to dismiss the action on the grounds that the District Court had no jurisdiction over the subject-matter of the complaint and that the complaint failed to state a claim. Tr. 27, 35. The court granted the motions on the latter ground. Tr. 95.

After the court had ordered the action dismissed (Tr. 95), but prior to the execution of formal orders dismissing the action, appellant filed with the District Court and served upon appellees an application for a hearing before a three-judge court. Tr. 107. Thereafter the formal orders of dismissal were filed. Tr. 115, 117.



**ARGUMENT.**

**THE DISTRICT COURT WAS CORRECT IN ITS CONCLUSION THAT PLAINTIFF'S COMPLAINT FAILED TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED.**

Appellant's claim that the rates approved by the Commission and charged by the Company were unlawful is founded upon sections 4251-4254 of the Internal Revenue Code, which establish an excise tax on telephone service to be paid by the telephone subscriber. The tax is broken down between "local" service and "long distance service," although it is at the rate of 10 percent for each type of service. "Long distance" service is defined in the code as being a message or conversation for which a toll charge of more than twenty-four cents is paid. "Local" service is defined as telephone service not within the definition of "long distance" service; in other words, service paid for on a flat rate basis and/or for which a toll charge of twenty-four cents or less is paid.

Appellant contends that under the above provisions of the Internal Revenue Code, the Company, although operating under tariffs approved by the California Public Utilities Commission (see 56 Cal. P.U.C. 80), cannot charge twenty-four cents or less for any message unit (H-1) call. She says that all such calls are covered by the A-1 schedule flat rate. The message unit (H-1) calls for which the charge is more than twenty-four cents are deemed long distance (B-1) calls by appellant. Apparently she has no objection to such charges.

Thus, it seems to be appellant's position that, although the Internal Revenue Code is not specifically

concerned with telephone rate regulation, it by inference prohibits state public utility commissions from authorizing any toll charges of less than twenty-five cents for a particular call, at least where the subscriber is billed a flat charge for some nearby calls. If appellant is wrong her complaint cannot state a claim. Appellant's position is not only wrong; it lacks even a shred of support in logic, in rules of statutory construction, or in case law.

It should be made clear at the beginning that this case does not involve an erroneous tax unless the rates charged by this appellee, apart from the taxes included, were unlawful. The tax for both "local" and "long distance" calls is the same, *i.e.*, ten percent. Hence, if the charges for service were correct and lawful, the tax charged was necessarily correct.

The question presented, therefore, is simply whether the Internal Revenue Code not only establishes a tax on telephone calls, but whether it also limits state public utilities commissions in establishing tariff schedules for telephone companies for intrastate calls. More specifically the question is whether the Internal Revenue Code prohibits this appellee from charging a flat rate for some short distance calls and a fluctuating rate of twenty-four cents or less for certain more distant calls, where the California Public Utilities Commission has approved such method of computing charges.

For Congress to have imposed such a limitation on the intrastate rate-making powers of state public utilities commissions would have been an unusual de-

parture from past practice and would be completely contrary to the entire scheme of regulation that Congress has established. See 47 U.S.C. §§152(b)(1), 153(e), 153(h), 221(b). For Congress to have legislated with respect to rate regulation in the Internal Revenue Code would be a legal oddity. For Congress to have done so by implication, where it could easily have expressed such an intention in clear and precise language, is scarcely conceivable. However, even if such objections be overlooked, appellant's claim completely breaks down for there is simply no such implication in the Code. Nothing in the sections cited by appellant in her complaint remotely indicates that only calls for which the charge is in excess of twenty-four cents may be billed on a fluctuating rate basis and all other calls must be billed only on a flat rate basis. In fact, the regulations under the 1939 Code (new regulations have not yet been issued) clearly contemplate combined flat and fluctuating rates for local calls. Reg. 42, Sec. 130.41(b).

Moreover, Sections 4251 and 4252 of the Internal Revenue Code were amended by the Excise Tax Technical Changes Act of 1958, P. L. 85-859, 72 Stat. 1275, enacted by the most recent Congress. The new law does not differentiate between "local" and "long distance" calls, but, instead, breaks the tax down between "general" and "toll" calls. The distinction between toll calls of twenty-four cents and less and other toll calls has been eliminated; all toll calls, including toll calls of twenty-four cents and less and toll calls in excess of twenty-four cents, are included within the

term "toll" calls. The tax on both types of calls remains at ten percent.

It would seem that appellant would not contend that the rate schedules assailed in her complaint are invalid under the new law. It is true that the alleged wrongful acts of which appellant complains occurred before the enactment of the new law, which does not become operative until January 1, 1959. However, the new law is useful in interpreting the sections upon which appellant relies. It is to be supposed that if these sections formerly regulated telephone rates, Congress would not have eliminated such regulatory provisions without at least noting that fact in the extensive reports accompanying the legislation that affected the amendment. It is therefore most significant that Senate Report No. 2090, which explained the legislation, did not indicate that it made any change in telephone rate regulation. 1958 U.S. Code Cong. and Ad. News, pp. 6011-6013. The reason seems obvious: the Internal Revenue Code even before the amendments did not include any telephone rate regulations.

In essence, the Code, as it formerly read and as it is amended, says no more than that there shall be a tax of ten percent on the charges for all telephone calls, whether they be local or long distance, toll or general. What those base charges may be or how they may be computed it does not say. Here a tax of ten percent was billed—no more, no less. Therefore, appellant's claim that the Internal Revenue Code was violated is groundless. She has failed to state a claim upon which relief may be granted.



THE DISMISSAL OF APPELLANT'S ACTION MAY ALSO BE SUPPORTED ON THE GROUND THAT THE DISTRICT COURT HAD NO JURISDICTION OVER THE SUBJECT MATTER OF THE COMPLAINT.

It is obvious that appellant cannot obtain jurisdiction in the federal courts under 28 U.S.C. §1331, relating to federal questions generally, because she has not sufficiently alleged that the matter in controversy exceeds the value of \$3,000, as required by that section at the time the action was commenced. *McNutt v. General Motors Accept. Corp.* (1936), 298 U.S. 178. Moreover, as shown in the preceding section, appellant's claim is so plainly without merit that there is no *substantial* federal question involved. It is, of course, well settled law that under such circumstances there is no federal jurisdiction. See 54 Am. Jur., United States Courts, §46.

Appellant seeks to avoid the necessity of alleging jurisdictional amount by asserting that her claim arises under "an Act of Congress providing for internal revenue" and that therefore there is jurisdiction under 28 U.S.C. §1340, which has no requirement with respect to jurisdictional amount. It would seem, however, that this section would be limited to suits by or against the Federal Government. In any event, the question presented lacks the necessary substantiality.

Finally, it should be noted that if any question were actually presented under the Federal Constitution, jurisdiction would be absent under 28 U.S.C. §1342, which provides:

"The district courts shall not enjoin, suspend or restrain the operation of, or compliance with,



any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:

“(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and

“(2) The order does not interfere with interstate commerce; and

“(3) The order has been made after reasonable notice and hearing; and,

“(4) A plain, speedy and efficient remedy may be had in the courts of such State.”

The H-1 schedule of which appellant complains clearly does not interfere with interstate commerce; it applies only to the Los Angeles Extended Area. In the absence of allegations to the contrary it must, of course, be assumed that the tariff order complained of was made after reasonable notice and hearing. If plaintiff has suffered a legal injury, there is a plain, speedy and efficient remedy in state courts. Appellant has not alleged the contrary.

It follows that the district court had no jurisdiction over the subject-matter of the complaint.

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**THE DISTRICT COURT JUDGE WAS AUTHORIZED TO DISMISS THE ACTION WITHOUT CONVENING A THREE-JUDGE COURT.**

Appellant contends that her complaint could not validly be dismissed by a single district court judge,

as it was, but that, instead, only a three-judge court could dismiss it. Appellant did not assert her alleged right to a hearing before a three-judge court until this case had been decided, but even if she had made a timely motion, she would not have been entitled to have a three-judge court convened.

Section 2281 of Title 28 of the United States Code, upon which appellant relies, provides:

“An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statute, shall not be granted by any district court or judge thereof upon the ground of unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.”

This statute can have no application against this appellee, Sunland-Tujunga Telephone Company, because by its terms it applies only to actions against state officers. It does not have any effect as to private parties.

Moreover, it says that certain injunctions “shall not be *granted*” by a district court judge without a hearing by a three-judge court. It says nothing about *dismissals* of actions seeking such injunctions. It is true that section 2284(5) of Title 28 states that a single judge shall not dismiss the action, but this has reference only to the time after a three-judge court

has been convened. As the court stated in *Jacobs v. Tawes* (4th Cir., 1957), 250 F. 2d 611, 614:

“Subsection 5 [of section 2284] was manifestly intended to regulate procedure after the court of three judges had been constituted, not to abrogate the statutory rule that the judge before whom the action was brought may dismiss it if the complaint does not state a case within the jurisdiction of the District Court.”

Numerous decisions have upheld the right of a single district court judge to dismiss an action of the type included in section 2281 where it is without substance. *Jacobs v. Tawes, supra*, is one of the most recent. There the court summarized the law in this regard:

“Appellant contends, however, that the District Judge was without jurisdiction to dismiss the case, arguing that, since a court of three judges was required for the hearing of the application for injunction, a single judge had no jurisdiction to take any action in the case and, because of the provisions of 28 U.S.C. §2284(5), might not dismiss it, even though no claim for relief cognizable in a federal court was stated in the complaint. We think that this contention is entirely without merit. The court of three judges is not a different court from the District Court, but is the District Court composed of two additional judges sitting with the single District Judge before whom the application for injunction has been made. 28 U.S.C. §2284(1). The purpose of the requirement of three judges for the hearing of such a case is to prevent the improvident invalidation of state legislation by action of a single judge. *Phillips v.*

United States, 312 U.S. 246, 248-251, 61 S.Ct. 480, 85 L. Ed. 800. The presence of the two additional judges is not required where no substantial question as to the validity of the state legislation is involved. *Ex parte Poresky*, 290 U.S. 30, 54 S. Ct. 3, 4, 78 L. Ed. 152; *Davis v. County School Board of Prince Edward County, D.C.*, 142 F. Supp. 616. The same is held where no basis for injunctive relief is asserted. *Linehan v. Waterfront Commission of New York Harbor, D. C.*, 116 F. Supp. 401 (a case decided after the enactment of 28 U.S.C. §2284). A fortiori, it is not required that the additional judges be summoned, when, as here, it appears from the complaint itself that the case is not one within the jurisdiction of the court. Such a case is manifestly not one 'required by Act of Congress to be heard and determined by a district court of three judges' within the language of 28 U.S.C. §2284. As said in *Ex parte Poresky*, supra, '\* \* \* the provision requiring the presence of a court of three judges necessarily assumes that the District Court has jurisdiction.' " (p. 614)

Here appellant's complaint neither states a claim nor shows jurisdiction. It therefore follows that the district court had authority to dismiss the case without convening a three-judge court.

Furthermore, if the complaint were to state a cause of action it would not be grounded upon any possible unconstitutionality of the Public Utility Commission tariffs under which this appellee operates, but simply upon the terms of the Internal Revenue Code. Although in a sense whenever a state law or order is



assailed on the ground that it violates a federal statute the Supremacy Clause is involved, it is well settled that there is no necessity in such cases to convene a three-judge court. This point was made in *Pennsylvania Greyhound Lines v. Board of P. U. Commissioners* (D.C.N.J., 1952), 107 F.Supp. 521, 525, where the court reviewed the leading decisions as follows:

“In deciding whether a suit for an injunction to restrain a state official upon the grounds of unconstitutionality of a state statute requires a three judge court, the United States Supreme Court has noted that two types of objections to state statutes have been made, both of which have their source in the United States Constitution. The substance of objections of the first type is the allegation that a state statute violates directly some constitutional provision. When an injunction is sought on that basis, a three judge court is necessary, *Query v. United States*, 316 U.S. 486, 62 S. Ct. 1122, 86 L. Ed. 1616. The substance of objections of the second type is the allegation that the supremacy clause of the Constitution has rendered inoperative a state law which would be valid had not Congress chosen to legislate. Cases of this nature have been considered primarily ones involving interpretation of a federal statute and not constitutional cases within the meaning of §2281. Consequently, a suit for an injunction against a state official in such circumstances need not be heard before a three judge court. *Ex parte Bransford*, 310 U.S. 354, 60 S. Ct. 947, 84 L. Ed. 1249.

“A fairly recent application of this classification of injunction suits is *Case v. Bowles*, 327 U.S. 92, 66 S. Ct. 438, 90 L. Ed. 552. The State



of Washington sold some of its school-land timber in a manner prescribed by its constitution and statutes. The United States Price Administrator sued in the federal district court to enjoin the State Commissioner of Public Lands from completing the sale, asserting that its consummation would constitute a violation of the Emergency Price Control Act and applicable regulations. Answering the State's contention that the case should have been tried by a three judge court, the Supreme Court stated:

“ \* \* \* But here the complaint did not challenge the constitutionality of the State statute but alleged merely that its enforcement would violate the Emergency Price Control Act \* \* \* ”  
327 U.S. 92, 97, 66 S.Ct. 438, 441.”

In addition to the cases cited therein, see *Bradley v. Waterfront Com'n of New York Harbor* (D.C.S.D. N.Y. 1955), 130 F. Supp. 303, 311.

Since the complaint fails both to state a claim and to show jurisdiction, and moreover raises no constitutional question, it must follow that the district court acted within its powers and authority in dismissing the action without convening a three-judge court.

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### CONCLUSION.

Appellant's complaint fails to state a claim because the Internal Revenue Code obviously does not regulate telephone rate charges. It fails to show jurisdiction because it is apparent that no substantial federal question is presented and it does not allege

the necessary amount in controversy. Moreover, appellant's attempt to bring this action under 28 U.S.C. §1340 should also be denied because that section was never intended to cover litigation between private parties. The complaint was therefore properly dismissed because it fails to state a claim and does not show jurisdiction.

Such dismissal need not be made by a three-judge court. It is well settled that a district court judge alone may dismiss an action where the complaint fails to state a substantial claim, or where it fails to show jurisdiction, or where it is based upon a federal statute, rather than being based directly upon the Constitution. Each of those elements is present here. Moreover, this appellee is not a state officer or regulatory body and hence the three judge provisions are inapplicable to it.

It is therefore respectfully requested that the decision of the District Court be affirmed.

Dated, November 19, 1958.

Respectfully submitted,

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No. 16,190  
United States Court of Appeals  
For the Ninth Circuit

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MRS. GRACE CARRIGAN,

*Appellant,*

VS.

SUNLAND-TUJUNGA TELEPHONE COMPANY  
and STATE OF CALIFORNIA, PUBLIC UTIL-  
ITIES COMMISSION,

*Appellees.*

BRIEF OF APPELLEE  
STATE OF CALIFORNIA, PUBLIC UTILITIES COMMISSION.

---

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FILED

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PAUL F. WATKINS





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**United States Court of Appeals  
For the Ninth Circuit**

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MRS. GRACE CARRIGAN,

*Appellant,*

VS.

SUNLAND-TUJUNGA TELEPHONE COMPANY  
and STATE OF CALIFORNIA, PUBLIC UTIL-  
ITIES COMMISSION,

*Appellees.*

---

**BRIEF OF APPELLEE**

**STATE OF CALIFORNIA, PUBLIC UTILITIES COMMISSION.**

---

**I. STATEMENT OF PLEADINGS.**

Appellant has certified numerous letters to this Court as part of the record herein. Appellee Public Utilities Commission neither has nor wants copies of said letters, nor any knowledge of their contents, as they properly form no part of the record. Although this appellee has not made any motion in this regard, it respectfully directs the Court's attention to the fact that matters not of record are before it.

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**II. STATEMENT OF FACTS.**

In her appeal brief, appellant states that appellees in making their motions to dismiss her complaint in

the Court below misrepresented and misstated the contents of the complaint, but does not give any statement of facts showing wherein said contents were misrepresented or misstated.

Very briefly, the facts are these:

Section 4251 of the Internal Revenue Code (Title 26 USC) prior to the 1958 session of Congress provided for a 10% excise tax on telephone charges. Local service was defined in Section 4252 as service which was not taxable as long distance service. Long distance service was defined as service for which a charge of more than 24¢ was made. Section 4254 provided that in computing the tax, all local service charges should be added together and the tax imposed on their sum, and all long distance service charges should be added together and the tax imposed on their sum, and not on the charges for each item.

In fixing schedules of telephone rates, appellee Commission has fixed for appellee telephone company rates and charges for three types of service which affect appellant—exchange, multi-message unit and message toll service.

The Commission has nothing to do with the tax imposed by the Internal Revenue Code, nor were such taxes included in the rates fixed. Appellee does not complain of the tax imposed on her flat-rate exchange service, nor of any tax of more than 24¢ on multi-message unit charges, nor of any tax on her message toll charges which are always in excess of 24¢. She complains that some of her multi-message unit calls (which go beyond her exchange boundaries) result

in charges of less than 24 cents on which a 10% tax was collected from her by appellee telephone company for the Bureau of Internal Revenue; that the appellee Commission cannot lawfully prescribe the above-mentioned three categories of service nor rates therefor because the Internal Revenue Code *for tax purposes* defined only two categories of service—local service as service for which a charge of less than 24¢ is made and long distance as service for which a charge of more than 24¢ is made.

Appellant asserts that appellee Public Utilities Commission has violated the Internal Revenue Code and the Fourteenth Amendment to the United States Constitution by prescribing multi-message unit schedules and rates which result in charges of less than 24¢; that such should be considered as part of her flat-rate monthly exchange service without additional charge and without itemization, and that all calls resulting in charges of more than 24¢ should be considered as message toll.

Appellant in her complaint asked for punitive damages from both appellees. No mention is made of any amount of actual damage. Appellant also asked that the Court order her disconnected telephone service to be restored; for refund of alleged illegal charges; for refund of alleged illegal tax on telephone calls; for an order requiring appellees to cease and desist at once the maintenance and collection of telephone charges allegedly in conflict with former provisions of the Internal Revenue Code; for an order to “expand” her exchange service to include all multi-mes-



sage unit calls for which the charge is 24¢ or less and to "expand" the message toll service to include all multi-message unit calls for which the charge is more than 24¢. This would result in there being left, insofar as appellant is concerned, only two schedules which would conform to the Internal Revenue Code's former tax definition of local and long distance telephone calls. It would also result, insofar as this appellee is concerned, in a negating of intrastate telephone rate schedules duly prescribed by it without relation to and not including any federal excise tax.

This appellee's motion to dismiss alleged (1) lack of jurisdiction of the District Court of the subject-matter of the complaint; (2) and the person of the defendant; (3) that the complaint did not state a claim against this appellee upon which relief might be granted; and (4) that the amount in controversy was actually less than the jurisdictional amount which at the time of filing the complaint was \$3,000.00. The motion to dismiss was granted upon the third ground.

Appellant's appeal seems to be centered upon the fact that the motion to dismiss was granted by a single judge and not by a three-judge Court.

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### III. ARGUMENT.

The provisions of 28 USCA, Secs. 2281 and 2284, requiring three-judge courts, do not require three judges to pass upon the initial question of jurisdiction. It appears on its face that the District Court

was without jurisdiction of the subject-matter of the complaint, or the person of this appellee; the complaint does not state a claim upon which relief may be granted; the complaint does not show actual damages in excess of \$3,000.00.

The complaint, further, does not present a constitutional question requiring the convening of a three-judge court pursuant to Section 2281, in that it does not challenge the constitutionality of the three rate schedules prescribed by appellee **Public Utilities Commission**, but alleges that the enforcement of such schedules violates 26 **USCA**, Secs. 4241, 4252 and 4254 and thus the **Fourteenth Amendment** to the **Constitution of the United States**.

A three-judge court is not necessary to pass upon the question of jurisdiction.

*Ex parte Poresky*, 290 U.S. 30, 54 S. Ct. 3, 78 L. ed. 152, is directly in point. There petitioner sought a writ of mandamus to compel a judge of a District Court to call to his assistance two other judges for the purpose of hearing an application for temporary injunction. Petitioner had sought to restrain a state registrar of motor vehicles from enforcing a state statute relative to compulsory automobile insurance. There was neither diversity of citizenship nor a substantial federal question.

The United States Supreme Court found that 28 **USCA** Sec. 2284 requiring a three-judge court to dismiss a complaint on the merits does not require three judges to pass upon the initial question of jurisdiction.

In *Jacobs v. Tawes*, 151 F. Supp. 770, plaintiff filed a complaint in the District Court to enjoin a state comptroller from collecting sales and use taxes in the amount of \$1,914.62. The court found:

“Although many of the questions raised by the complaint and the motion to dismiss can properly be disposed of only by a three-judge court, 28 USC Sec. 2281, the district judge to whom such a complaint is presented is under a duty to examine the pleading to see if the court has jurisdiction. A three-judge court need not be convened where it appears clearly on the face of the complaint that the court does not have jurisdiction.” (Citing cases.)

The court dismissed the complaint on the ground that the amount in controversy was less than \$3,000.00.

In *Linehan v. Waterfront Commission of New York Harbor*, 116 F. Supp. 401, plaintiffs sought to restrain the operation and enforcement of a section of the Waterfront Commission Act on the ground of constitutional infirmities under the United States Constitution and the Constitution of the State of New York. A three-judge court was sought. Defendants moved to dismiss on the grounds that the complaint stated no claim upon which relief could be granted, failed to state a cause of action against defendants and that the Court had no equity jurisdiction. The Court stated (p. 403):

“At the threshold of inquiry is the question of the power of the District Judge to consider and pass upon the various motions for dismissal of the complaint without submitting them to a three-judge statutory court. The cases impress upon

the single judge the duty to determine whether the jurisdictional bases for convening a three-judge statutory court exist."

The District Judge in the court below fulfilled the duty imposed upon him, and his determination that the complaint on its face stated no grounds upon which relief could be granted was obviously correct.

The Court was without jurisdiction of the subject matter of the complaint. Section 1342 of Title 28 of the U.S. Code provides:

"1342. *Rate orders of State agencies.*

"The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:

"(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,

"(2) The order does not interfere with interstate commerce; and,

"(3) The order has been made after reasonable notice and hearing; and,

"(4) A plain, speedy and efficient remedy may be had in the courts of such State. June 25, 1948, c. 646, 62 Stat. 932."

Since appellee State of California, Public Utilities Commission, has exclusive jurisdiction to fix telephone rates within the State of California (28 USCA Sec. 1342, Art. XII, Sec. 23, Constitution of the State of California) it follows that the complaint does not state



a claim against said Commission upon which the relief sought could be granted. Relief is barred by 28 USCA, Sec. 1342, which precludes district courts from interfering with rates chargeable by a public utility such as appellee telephone company, when made by a State rate-making body, which is what appellee Commission is, where claimed jurisdiction is based solely on alleged repugnance of the order to the Federal Constitution, where there is alleged no interference with interstate commerce, where there is no allegation that the order was not made after reasonable notice and hearing, and where there is no allegation that plaintiff has no plain, speedy and efficient remedy in the courts of the State.

Appellant's complaint does not allege that the schedules mentioned in her complaint interfere with interstate commerce or that the decision or order of appellee Commission was made without reasonable notice and public hearing. Neither does appellant allege that she has no plain, speedy and efficient remedy in the courts of the State of California.

Obviously the District Court has no jurisdiction to enjoin appellee Commission from prescribing or enforcing the schedule of rates in question. It has no jurisdiction to "expand" the three schedules into two schedules so as to make them conform to a tax definition of local and long distance service. Appellee Commission has *exclusive* jurisdiction to fix intrastate schedules of telephone rates and charges. (Article XII, Section 23, Constitution of the State of California.)

Only appellee Commission may prescribe regulation of telephone service and tariff schedules. It does not



prescribe excise taxes to be paid on telephone charges nor do the telephone schedules in question include such taxes. The collection of such taxes is the function of the Bureau of Internal Revenue in conformity with the provisions of the Internal Revenue Code, but said Code provides only for collection of taxes and does not provide for regulation of telephone service nor limit the number of tariff schedules, which only appellee Commission may prescribe.

The complaint discloses that the District Court had no jurisdiction of the person of appellee State of California, Public Utilities Commission, since it does not allege that the consent of the State of California to be sued had been sought or obtained. (*Fitts v. McGhee*, 19 S. Ct. 269, 172 U.S. 524, 43 L. ed. 535.)

Appellant in her complaint makes the bare assertion that appellee Commission had given "plaintiff cause for double damages" for prescribing and enforcing the three rate schedules in question "in the sum of \$10,000.00" and damages in the sum of \$20,000.00 for not restraining appellee telephone company from removing her telephone. This is not enough to confer jurisdiction on the District Court.

In *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 80 L. ed. 1135, we find:

"... The object or right to be protected against unconstitutional interference is the right to be free of that regulation. *The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed.* The particular allegations of respondent's bill as to the extent or value of its business throw no light upon that subject. They fail to set forth any

facts showing what, if any, curtailment of business and consequent loss the enforcement of the statute would involve. The bill is thus destitute of any appropriate allegation as to jurisdictional amount save the general allegation that the matter in controversy exceeds \$3,000." (Emphasis supplied.)

The complaint herein throws no light upon the amount of actual damage, if any, appellant has suffered nor is there any statement of facts setting forth "what, if any, curtailment of business and consequent loss the enforcement" of the said schedules, which do not include federal excise tax, "would involve." The complaint "is thus destitute of any appropriate allegation as to jurisdictional amount save the general allegation" that the damages for non-payment of telephone charges and subsequent removal of telephone amount to \$30,000.00 insofar as appellee Commission is concerned.

Even if appellant's complaint could meet the jurisdictional requirements of Section 1342 of Title 28 of the U. S. Code, still it does not present such a case as must be heard by a three-judge court.

Appellant's complaint alleges that appellee Commission maintained and enforced the three telephone rate schedules hereinabove mentioned, although Sections 4251, 4252 and 4254 provided an excise tax on only two types of telephone charges, which are defined in the Internal Revenue Act of 1954. She alleges that thereby appellee has violated those sections of the Internal Revenue Code and, thus, the Fourteenth Amendment to the Constitution of the United States.

She does not allege that the Commission's rate schedules are unconstitutional without reference to federal legislation. In *Pennsylvania Greyhound Lines v. Board of Public Utility Commissioners*, 107 F. Supp. 521, the court discusses the necessity of convening a three-judge court under such circumstances. On pages 525-526 we find:

"The substance of objections of the second type is the allegation that the supremacy clause of the Constitution has rendered inoperative a state law which would be valid had not Congress chosen to legislate. Cases of this nature have been considered primarily ones involving interpretation of a federal statute and not constitutional cases within the meaning of § 2281. Consequently, a suit for an injunction against a state official in such circumstances need not be heard before a three judge court. *Ex parte Bransford*, 310 U.S. 354, 60 S.Ct. 947, 84 L.Ed. 1249.

"A fairly recent application of this classification of injunction suits is *Case v. Bowles*, 327 U.S. 92, 66 S.Ct. 438, 90 L.Ed. 552. The State of Washington sold some of its school-land timber in a manner prescribed by its constitution and statutes. The United States Price Administrator sued in the federal district court to enjoin the State Commissioner of Public Lands from completing the sale, asserting that its consummation would constitute a violation of the Emergency Price Control Act and applicable regulations. Answering the State's contention that the case should have been tried by a three judge court, the Supreme Court stated:

" \* \* \* But here the complaint did not challenge the constitutionality of the State statute

but alleged merely that its enforcement would violate the Emergency Price Control Act.\* \* \*  
327 U.S. 92, 97, 66 S. Ct. 438, 441.

“[3] It would seem that the reasoning of Case v. Bowles, supra, would govern the instant case. Despite occasional broad language in the complaint, the plaintiff's case rests upon the proposition that the New Jersey statute is inoperative as it applies to it because congressional legislation and valid regulations pursuant thereto govern it, removing it from the area of state control, and not upon the proposition that the New Jersey statute is unconstitutional without regard to federal legislation. Thus, even were § 2281 controlling in a suit for a declaratory judgment, a three judge court would not be necessary here.”

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#### IV. CONCLUSION.

Appellee State of California, Public Utilities Commission, respectfully submits that the District Court in sustaining its motion to dismiss committed no error; that it was unnecessary for the Judge in the Court below to convene a three-judge court; that this Honorable Court should affirm the action of the District Court.

Dated: November 21, 1958.

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MARY MORAN PAJALICH,  
Senior Counsel,

*Attorneys for Appellee State of California,  
Public Utilities Commission.*

No. 16191

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United States  
Court of Appeals  
FOR THE NINTH CIRCUIT

---

KENNETH EDWARD HOPPER,  
*Appellant,*

vs.

UNITED STATES OF AMERICA,  
*Appellee.*

---

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
NORTHERN DIVISION

---

HONORABLE JOHN C. BOWEN, *Judge*

---

BRIEF OF APPELLEE

---

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No. 16191

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United States  
Court of Appeals  
FOR THE NINTH CIRCUIT

---

KENNETH EDWARD HOPPER,  
*Appellant,*

vs.

UNITED STATES OF AMERICA,  
*Appellee.*

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
NORTHERN DIVISION

---

HONORABLE JOHN C. BOWEN, *Judge*

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BRIEF OF APPELLEE

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No. 16191

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United States  
Court of Appeals  
FOR THE NINTH CIRCUIT

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KENNETH EDWARD HOPPER,  
*Appellant,*

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UNITED STATES OF AMERICA,  
*Appellee.*

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT  
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HONORABLE JOHN C. BOWEN, *Judge*

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BRIEF OF APPELLEE

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STATEMENT OF JURISDICTION

Appellee adopts appellant's statement of jurisdiction.



COUNTERSTATEMENT OF THE CASE <sup>1</sup>

Kenneth Edward Hopper appealed from a verdict of guilty which was returned on July 17, 1958 on Counts I through IV, of an indictment charging violations of the narcotic laws. A verdict of not guilty on Count V of the indictment was returned (Tr. 19). Prior to trial, Hopper moved to suppress a quantity of narcotics sold by him to Younger, an informer, and delivered by Younger to Federal Narcotic Agent Gooder and a quantity of narcotics seized in his hotel room after his arrest. He also moved for the return of the money used by Younger to purchase the drugs from him (Tr. 2). This motion was denied (Tr. 6). Appellant contends that the District Court erred in its ruling and in subsequently admitting these items into evidence.

On March 25, 1958, the appellant was in the company of Younger, an informer, at various times (Tr. 6, Affidavits of Dupuis, Hope, Gooder, Kirschner, Henaby and Younger; S.F. 59-61). The appellant was known through informants to Seattle Police Detectives Kirschner and Henaby and to Federal Narcotics Agents Dupuis, Gooder and Hope to have sold narcotics during

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<sup>1</sup> Appellee will adopt appellant's abbreviations, i.e., (Tr.) for all portions of the record except the court reporter's transcript of the trial proceedings which will be referred to by the abbreviation (S.F.)

November 1957 (Tr. 6, Affidavits of Dupuis, Hope, Gooder, Kirschner, Henaby and Younger). These informants had been requested by Detective Kirschner to let him know when the appellant returned to the Seattle area (Tr. 6, Affidavit of Kirschner). Lawrence L. Younger was well known to these officers as a narcotic user; to have assisted in many narcotic cases investigated by the Seattle Police Department and to have assisted in a number of cases as a special employee of the Federal Narcotic Bureau in Seattle (Tr. 6, Affidavits of Dupuis, Hope, Gooder, Kirschner and Henaby). He had proven to be reliable in tips and information he had given to these officers in the past (Tr. 6, Affidavits of Dupuis, Hope, Gooder, Kirschner and Henaby).

Shortly after noon on March 25, 1958, appellant met Younger at the corner of Maynard and Jackson Streets in Seattle (Tr. 6, Affidavit of Younger; S.F. 59). They went to a room in the nearby Atlas Hotel (Tr. 6, Affidavit of Younger; S.F. 60). Hopper told Younger that he had five ounces of narcotics for sale at \$300.00 per ounce and Younger told Hopper that if it was any good he would buy an ounce (Tr. 6, Affidavit of Younger; S.F. 61). Younger was given two capsules of narcotics as samples (S.F. 101). After Younger had used the samples, he advised Hopper that it would take a few hours to raise the money to buy an

ounce (Tr. 6, Affidavit of Younger; S.F. 61). Hopper then asked Younger to help him sell the other four ounces of narcotics (Tr. 6, Affidavit of Younger; S.F. 61). Younger told Hopper to wait at Hopper's hotel until Younger called him later on that day (Tr. 6, Affidavit of Younger). At approximately 5:00 P.M. that afternoon, Younger called Hopper by telephone at Hopper's hotel and advised Hopper that he had located someone who wanted to make a big purchase if the "stuff" was any good (Tr. 6, Affidavit of Younger; S.F. 62). Hopper advised Younger to come to the Frye Hotel where he was staying and get some samples. Shortly thereafter, Younger went to Hopper's hotel room and got four capsules (Tr. 6, Affidavit of Younger; S.F. 62-63).

After Younger entered Hopper's room at the Frye Hotel, Hopper left the hotel room for two or three minutes, possibly longer and returned to the room with narcotics from which he made up four capsules (Tr. 6, Affidavit of Younger; S.F. 63). Younger did not know where Hopper kept his narcotics, nor did Hopper tell Younger where he kept the narcotics (Tr. 6, Affidavit of Younger).

After Younger left Hopper's hotel room he made a telephone call to Detective Kirschner at Detective Kirschner's home (Tr. 6, Affidavits of Younger and

Kirschner; S.F. 63). Younger told Kirschner that Hopper was back in town and had a lot of narcotics (Tr. 6, Affidavits of Younger, Kirschner). In response to questions from Detective Kirschner, Younger advised that Hopper was staying at the Frye Hotel, but that he, Younger, did not know or could not remember Hopper's hotel room (Tr. 6, Affidavits of Younger and Kirschner). Detective Kirschner told Younger to find out what room Hopper was staying in at the Frye Hotel and to meet him at his office in the Public Safety Building at 8:00 o'clock that evening (Tr. 6, Affidavits of Younger and Kirschner).

Detective Kirschner then made arrangements to meet Detective Henaby and Federal Narcotic Agents Dupuis, Gooder and Hope (Tr. 6, Affidavit of Kirschner). At 8:00 o'clock or shortly thereafter, the above-mentioned officers and Younger met at the Narcotics Office, Seattle Police Department in the Public Safety Building, Seattle, Washington (Tr. 6, Affidavits of Dupuis, Hope, Gooder, Kirschner, Henaby and Younger; S.F. 35, 47, 56, 64, 218, 251). In response to questions, Younger told the officers that Hopper was staying in room 304, Frye Hotel; that any deal with Hopper had to be made as soon as possible as Hopper was trying to dispose of his narcotics to LeRoy Lemons and/or some other persons at \$300.00 an ounce or \$1500.00; that he did not know where Hopper

had his narcotics "planted"; that Hopper did not have the narcotics in his hotel room, but had left the hotel room for two or three minutes and possibly longer, returning with the narcotics from which he made up four capsules which Hopper gave to Younger and that Hopper did not tell Younger where he had the narcotics "planted" (Tr. 6, Affidavits of Younger, Hope, Dupuis, Gooder, Kirschner and Henaby).

At the request of the officers, Younger called Main 2-8303 (Tr. 6, Affidavits of Younger, Hope, Dupuis, Gooder, Kirschner and Henaby; S.F. 65, 38, 218). Detective Kirschner was listening to the conversation, and the person answering the telephone stated it was the Frye Hotel (Tr. 6, Affidavits of Younger and Kirschner; S.F. 38). Younger then asked for room 304 (Tr. 6, Affidavits of Younger and Kirschner; S.F. 65). He was told that Hopper was in the bar and that an attempt would be made to get hold of him (Tr. 6, Affidavits of Younger and Kirschner; S.F. 65). After about five minutes a man answered and said, "Hopper speaking" (Tr. 6, Affidavits of Younger and Kirschner; S.F. 66). Arrangements were then made by Younger to meet Hopper at his room at the Frye Hotel about ten minutes after a fight which was then being broadcast, for the purpose of buying the narcotics which Younger had earlier agreed



to purchase from Hopper (Tr. 6, Affidavits of Younger, Kirschner; S.F. 67).

After the telephone conversation, a plan was formulated by the police detectives and federal narcotic agents whereby Younger, Hope and Henaby would go to the Frye Hotel together, the officers keeping Younger under surveillance until he had entered Hopper's hotel room and two or three minutes later, Dupuis, Gooder and Kirschner would follow (Tr. 6, Affidavits of Kirschner, Henaby, Dupuis, Hope, Gooder and Younger). It was part of the plan that Hope and Henaby would remain in a position where they could see Younger enter Hopper's hotel room, but not be seen if someone stepped out of Hopper's room. It was further planned with Younger that he would immediately find out whether there were any narcotics in Hopper's room and that if there were no narcotics, he was immediately to leave. It was the plan of these officers in such event to return to the Narcotic Office, Seattle Police Department and determine a new course of action. In the event that Younger remained inside Hopper's room for more than five minutes, the officers would know that Hopper had narcotics inside the room and the sale to Younger was taking place there (Tr. 6, Affidavits of Kirschner, Henaby, Hope, Gooder, Dupuis and Younger). To enable Younger to know when five minutes had

elapsed, Detective Kirschner gave Younger his watch (Tr. 6, Affidavits of Kirschner and Younger).

At approximately 9:20 P.M. on that evening, Agents Gooder, Hope and Dupuis searched Younger for narcotics and found none. Thereafter Gooder furnished Younger with \$200.00 in identifiable government advance funds (Tr. 6, Affidavits of Younger, Gooder, Hope, Dupuis; S.F. 67, 37, 57, 218, 251-252).

Henaby, Younger and Hope then left for room 304, Frye Hotel. Henaby and Hope observed Younger go to room 304, knock on the door and obtain entrance. These officers positioned themselves so that they could watch room 304, but not be seen by anyone who stepped out of that room (Tr. 6, Affidavits of Younger, Henaby and Hope; S.F. 219, 49-50, 68). At approximately 9:40 P.M., Detective Kirschner and Agents Gooder and Dupuis arrived (Tr. 6, Affidavits of Kirschner, Gooder and Dupuis; S.F. 41, 57, 252). Since the five minute period had by that time elapsed Detectives Henaby and Kirschner immediately took up positions outside room 304, Frye Hotel (Tr. 6, Affidavits of Kirschner and Henaby; S.F. 51, 41). Henaby and Kirschner could hear Younger talking with someone inside the room and, in view of their knowledge of Lawrence Younger, the telephone call and plans they had made and based on their experience

with narcotics, narcotic dealers and narcotic users, they concluded that Younger was purchasing a quantity of narcotic drugs from Hopper (Tr. 6, Affidavits of Henaby and Kirschner).

At approximately 10:00 P.M. that evening, the door to Room 304 opened and Younger came out, holding in his left hand a "bundle" which he gave to Gooder in the hallway immediately outside the door (Tr. 6, Affidavits of Gooder and Younger; S.F. 70-71). Before entering the room through the open door, Detectives Kirschner and Henaby and Agent Hope could see that there was only one other person inside the room (Tr. 6, Affidavits of Kirschner, Henaby and Hope; S.F. 143-144, 149). Henaby and Kirschner entered the room with Hope immediately behind them (Tr. 6, Affidavits of Kirschner, Henaby and Hope; S.F. 149, 221). Kirschner said, "This is the police, Hopper. You are under arrest" (Tr. 6, Affidavits of Kirschner, Henaby and Hope; S.F. 113, 149, 221, 268). Hopper then ran three or four steps and grabbed something from the dresser (Tr. 6, Affidavits of Kirschner, Henaby and Hope; S.F. 113, 149, 221). Henaby and Kirschner held Hopper's hands and attempted to take a rubber tube from his right hand. In the scuffle which ensued, Kirschner ripped the rubber tube and Hopper flung it toward the door (Tr. 6, Affidavits of

Kirschner, Henaby and Hope; S.F. 113, 149, 221). At that time, Dupuis, who was about to enter the room, was hit in the face with the rubber tube (Tr. 6, Affidavit of Dupuis; S.F. 254). The contents of this tube spilled on Dupuis and fell on the threshold to Room 304, spilling partly inside and partly outside the room (Tr. 6, Affidavit of Dupuis; S.F. 254).

After Hopper was subdued and handcuffs were placed upon him, a roll of bills was obtained from his person. These bills corresponded to the \$200.00 which had previously been given to Younger by Agent Gooder (Tr. 6, Affidavits of Kirschner, Henaby, Gooder, Hope; S.F. 150, 122-123, 222-223). Hopper was then taken to the Seattle City Jail (Tr. 6, Affidavits of Kirschner and Henaby).

On May 5, 1958, appellant filed a motion for return of property and to suppress evidence (Tr. 2), supported by his own affidavit (Tr. 3). On May 15, 1958, the appellee filed affidavits of Younger, Kirschner, Henaby, Gooder, Hope and Dupuis (Tr. 6). After hearing on May 19, 1958 and after further hearing on July 14, 1958, the appellant's motion was denied (Tr. 6). During the trial, the government introduced into evidence the currency obtained from Hopper as plaintiff's Exhibit 4 (S.F. 298), the quantity of narcotics which Younger gave to Gooder outside Room

304 as plaintiff's Exhibit 1 and the quantity of narcotics which had been contained in the rubber tube thrown by Hopper during the scuffle with the officers as plaintiff's Exhibit 2 (S.F. 298).

## QUESTION PRESENTED

Did the District Court err in denying the appellant's motion for return of property and to suppress evidence and further err in permitting the appellee to introduce Exhibits 1, 2 and 4 into evidence during the trial. The answer to this question depends upon the answers to the following issues discussed in this brief:

- I Whether the narcotics sold by appellant to Younger and delivered to the officers in the hallway outside appellant's hotel room before any entry or arrest were subject to a motion to suppress by appellant.
- II Whether there was probable cause to arrest the appellant without a warrant.
- III Whether the entry into defendant's hotel room through an open door renders the arrest and therefore the search illegal.
- IV Whether the search was incident to a lawful arrest and otherwise reasonable within the requirements of the Fourth Amendment to the Constitution of the United States.

## SUMMARY OF ARGUMENT

1. Appellee contends that with regard to the quantity of narcotics delivered by the special employee,



Younger, to Federal Narcotic Agent Gooder in the hallway outside room 304 of the Frye Hotel at 10:00 P.M., March 25, 1958, the trial court did not err in denying appellant's motion to suppress nor did it err in admitting these narcotics into evidence because the appellant claimed neither the right to possession of the hallway where the drugs were seized nor a possessory interest in the property seized. Further, since there was no entry into appellant's hotel room nor arrest nor search until after Younger delivered the drugs to Gooder, this exhibit was neither subject to a motion to suppress nor inadmissible as evidence.

2. The Seattle Police Detectives who arrested the appellant at 10:00 P.M. on March 25, 1958 had probable cause to believe that the appellant had committed and was then committing a felony. Accordingly, they had the duty under Washington law to arrest appellant.

3. Having the duty to arrest appellant at that time, they had the right to effect a peaceable entry through an open door to accomplish appellant's arrest. Such an entry is permissible under Washington law and does not violate the appellant's rights under the Fourth Amendment to the Constitution of the United States.

4. The search of appellant's person and his hotel room being incident to his lawful arrest was otherwise reasonable within the requirements of the Fourth Amendment.

## ARGUMENT

### I

THE NARCOTICS SOLD BY THE APPELLANT TO YOUNGER AND GIVEN TO THE OFFICERS IN THE HALLWAY OUTSIDE APPELLANT'S HOTEL ROOM BEFORE ANY ENTRY OR ARREST WERE NOT SUBJECT TO A MOTION TO SUPPRESS BY APPELLANT.

That the owner of contraband property illegally seized, though not entitled to have it returned to him, is entitled on motion to have it suppressed as evidence on his trial is not to be doubted, *Jeffers v. United States*, 1951, 342 U.S. 48, 54, 72, S.Ct. 93, 96 L.Ed. 59, but one so moving must assert some interest in the property seized, *Wilson v. United States*, 10 Cir., 1955, 218 F. 2d 754, 756, or proprietary interest in the premises searched, *In re Nassetta*, 2 Cir., 1942, 125 F. 2d 924, 925; *United States v. Pepe*, 2 Cir., 1957, 247 F. 2d 838, 841. With regard to plaintiff's Exhibit 1, which was handed to Agent Gooder by Younger outside room 304 of the Frye Hotel and which had been sold to Younger by Hopper, the appellant was in no position to suppress the same as evidence since he did not

claim any interest in those narcotics nor in the hallway outside room 304 of the Frye Hotel (Tr. 3; Tr. 6, Affidavit of Gooder). Indeed, no entry, arrest or search was made until after Younger delivered this quantity of narcotics to Gooder.<sup>2</sup> As the court said in *United States v. Pepe, supra*, at page 841:

“It is well settled that one who does not show either the right to possession of the premises searched or a possessory interest in the property seized will not be heard to complain that a search and seizure are illegal”. See also *Armstrong v. United States*, 9 Cir., 1926, 16 F. 2d 62, 65, cert. den. 273 U.S. 766, 47 S.Ct. 571, 71 L.Ed. 881.

## II

### THERE WAS PROBABLE CAUSE TO ARREST THE APPELLANT WITHOUT A WARRANT.

An officer has the undoubted right to search the person whom he lawfully arrests, *Weeks v. United States*, 1914, 232 U.S. 383, 392, 34 S.Ct. 341, 58 L.Ed. 652, and contemporaneously with such arrest to search the place in which it is made, *Rabinowitz v. United States*, 1950, 339 U.S. 56, 61, 70 S.Ct. 430, 94 L.Ed. 653; *Harris v. United States*, 1947, 331 U.S. 145, 151, 67

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<sup>2</sup> In connection with the marked government advance funds which the appellant seeks to have returned to him, it would appear anomalous that anyone could engage in a criminal narcotics transaction and have the government by judicial sanction be compelled to deliver to him government money so that he could profit from the transaction, even if entitled to have it suppressed.

S.Ct. 1098, 91 L.Ed. 1399; *Agnello v. United States*, 1925, 269 U.S. 20, 30, 46 S.Ct. 4, 70 L.Ed. 145. It is appellee's position that the search of appellant's person and of the hotel room where he was arrested was incident to his valid arrest. The determination of the validity of an arrest is governed by state law in the absence of an applicable federal statute. *Miller v. United States*, 1958, 357 U.S. 301, 305, 78 S.Ct. 1190, 2 L.Ed. 2d 1332; *Johnson v. United States*, 1948, 333 U.S. 10, 15, 68 S.Ct. 367, 92 L.Ed. 436; *United States v. DiRe*, 1948, 332 U.S. 581, 589, 68 S.Ct. 222, 92 L.Ed. 210; *Symons v. United States*, 9 Cir., 1949, 178 F. 2d 615, 619. The leading expression by the Supreme Court of Washington on the question of the validity of an arrest without a warrant is contained in *State v. Hughlett*, 1923, 124 Wash. 366, 214 Pac. 814. The court there said at page 368 as follows:

"Circumstances, however, may arise where it is not only within the power of the police officers, but it is their duty to make arrest without any warrant therefor. In misdemeanor cases the officer may not arrest without a warrant therefor, except where the crime is being committed in his presence, or where he had actual knowledge that the person about to be arrested committed the crime. But in cases amounting to a felony, if the officer believe, and have good reason to believe, that a person has committed, or is about to commit, or is in the act of committing the crime, then he may arrest without a warrant. But the arresting officer must not only have a real belief

of the guilt of the person about to be arrested, but such belief must be based upon reasonable grounds".<sup>3</sup>

The Washington rule is the same as that confirmed in this court's opinion in *Blackford v. United States*, 1957, 247 F. 2d 745, 749; it is the common law rule, *State v. Symes*, 1899, 20 Wash. 484, 488, 55 Pac. 626, and it is the standard of 26 U.S.C. §7607,<sup>4</sup>; *Draper v. United States*, January 26, 1959, \_\_\_\_\_ U.S. \_\_\_\_\_, 27 L.W. 4085, 4086, reported below in 248 F. 2d 295, 10 Cir.; *United States v. Walker*, 7 Cir., 1957, 246 F. 2d 519, 526.

Probable cause for arrest is defined in *State v. Hughlett, supra*, [124 Wash. 366] at page 368 as,

"... a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the

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<sup>3</sup> The appellant's unsupported statement at page 13 of his brief that the law requires that "... the arresting officers have positive knowledge that a felony has occurred and a reasonable belief that the one to be arrested is the perpetrator of it ..." to justify an arrest without a warrant is not the law of Washington. See *Johnson v. United States*, 1948, 333 U.S. 10, 15, 68 S.Ct. 367, 92 L.Ed. 436. The *Hughlett* case has been cited with approval in many Washington cases discussing probable cause to arrest without a warrant. *State v. Thornton*, 1926, 137 Wash. 495, 498, 243 Pac. 12; *State v. Knudsen*, 1929, 154 Wash. 87, 91, 280 Pac. 922; *State v. Zupan*, 1929, 155 Wash. 80, 85, 283 Pac. 671; *State v. Lindsey*, 1937, 192 Wash. 356, 359, 73 P. 2d 738, cert. den. 303 U.S. 654, 58 S.Ct. 761, 82 L.Ed. 1114, reh. den. 303 U.S. 669, 58 S.Ct. 830, 82 L.Ed. 1125; *State v. Kranz*, 1945, 24 Wn. (2d) 350, 352, 164 P. 2d 453; *State ex rel Fong v. Superior Court*, 1948, 29 Wn. (2d) 601, 608, 188 P. 2d 125; *State v. Young*, 1952, 39 Wn.



accused to be guilty. An officer may not arrest simply because he has some fleeting idea that one may be about to commit a felony, but he must have reasonable ground for his belief."

This definition was followed in *State ex rel Fong v. Superior Court*, 1948, 29 Wn. (2d) 601, 608, 188 P. 2d 125, citing 4 *Am. Jur.* 18, 19, Arrest, §§25, 26; 6 C.J.S. 586, 689, Arrest §6. It is substantially the same as that used in *Carroll v. United States*, 1925, 267 U.S. 132, 162, 45 S.Ct. 280, 69 L.Ed. 543; *Brinegar v. United States*, 1949, 338 U.S. 160, 175, 69 S.Ct. 1302, 93 L.Ed. 1879, and *Blackford v. United States*, *supra*, [247 F. 2d 745], at page 749. It is substantially the same definition used by the court in *Draper*, *supra*, [27 L.W. 4085], in defining "reasonable grounds" as that term is used in 26 U.S.C. §7607. It is the definition of "probable cause" as that term is used in the Fourth Amendment to the Constitution of the

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(2d) 910, 915, 239 P. 2d 858; *State v. Mason*, 1953, 41 Wn. (2d) 746, 750, 252 P. 2d 298; *State v. Henker*, 1957, 50 Wn. (2d) 809, 811, 315 P. 2d 645. See also *State v. Phillips*, 1931, 163 Wash. 207, 209, 300 Pac. 521 and *State v. Robbins*, 1946, 25 Wn. (2d) 110, 113, 169 P. 2d 246.

426 U.S.C. §7607 provides in pertinent part:

"The Commissioner . . . and agents, of the Bureau of Narcotics . . . may—

\*       \*       \*       \*       \*       \*

"(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs . . . where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

United States,<sup>5</sup> *Draper, supra*, at 27 L.W. 4086. In *Draper, supra*, at 27 L.W. 4087 the court said:

“‘In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians, act’ *Brinegar v. United States, supra*, at page 175. Probable cause exists where ‘the facts and circumstances within [the arresting officer’s] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that’ an offense has been or is being committed. *Carroll v. United States*, 267 U.S. 132, 162.”

In this connection, the Washington Supreme Court in *State v. Green*, 1953, 43 Wn. (2d) 102, 260 P. 2d 343, at page 108, quoted with approval the following pertinent language of the trial judge:

“‘In the natural development of any case there is a stage where responsible law enforcement officers must act. They cannot wait in every case until they have in their hands a completely prepared case that proves a man guilty beyond reasonable doubt, before they file a charge or before they arrest. If they were required to do so, our

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<sup>5</sup> The Fourth Amendment to the Constitution of the United States provides as follows:

“The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.”

whole system of law enforcement would break down.

So here the test is not whether at that moment in the Ambassador Hotel at the time they made the arrest they had enough evidence to make a complete case of proof of guilt. The question is: Did they have enough information to make them honestly believe that there was probable cause and reasonable grounds connecting the defendants with the charge?" "

In *Johnson v. United States, supra*, [333 U.S. 10] discussed in Appellant's Brief commencing at page 20, a Seattle narcotic detective received information at about 7:30 P.M. from a confidential informant who was a known narcotic user that unknown persons were smoking opium in the Europe Hotel. The detective communicated this information to federal narcotic agents and between 8:30 and 9:00 P.M., the officers went to the hotel. Upon arrival these experienced officers immediately recognized a strong odor of burning opium which to them was distinctive and unmistakable. This odor led them to a particular room where they knocked, identified themselves as police and after some shuffling noise and slight delay were admitted by the defendant. The officers placed her under arrest; searched the apartment and seized opium and opium smoking apparatus.

The government contended that the search was incident to a valid arrest, but conceded that the arrest-

ing officer did not have probable cause to arrest until he entered the room and found the defendant to be the sole occupant. The court said at page 16:

“Thus the government quite properly stakes the right to arrest, not on the informer’s tip and the smell the officers recognized before entry, but on the knowledge that she was alone in the room, gained only after and wholly by reason of, their entry of her home. It was therefore their observations inside of her quarters, after they had obtained admission under color of their police authority, on which they made the arrest.

Thus the government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest.”

The facts here involved are dissimilar. The arrest was based on facts learned prior to the entry into room 304 of the Frye Hotel. The validity of Hopper’s arrest does not depend on any search.

In *Agnello v. United States*, *supra*, [269 U.S. 20], Centorino, Pace, Frank and Thomas Agnello left Frank Agnello’s home and went to Alba’s house. Looking through the windows of Alba’s house, narcotic agents saw Frank Agnello produce a number of small packages for delivery to Napolitano, an informer, and saw Napolitano hand over money to Alba. Napolitano had gone there to purchase narcotics. Upon the apparent consummation of the sale, the agents rushed in and arrested all the defendants. There was no analysis of the substance in the packages prior to the

arrests nor was there a search or arrest warrant. The officers found some packages on the table where the transaction took place and found others in the pockets of Frank Agnello. All contained cocaine. On searching Alba, they found the money given him by Napolitano. The Supreme Court said at page 30:

"The legality of the arrests or of the searches and seizures made at the home of Alba is not questioned. Such searches and seizures naturally and usually appertain to and attend such arrests."

In *United States v. Garnes*,<sup>6</sup> 2 Cir., 1958, 258 F. 2d 530, 532, reported below in 156 F. Supp. 467, 1957, D.C. S.D. N.Y., the facts were set forth as follows:

"Shortly after midnight on the night of May 31, 1957, Bureau of Narcotic Agents arrested Norman Becknell in New York City as he was in the

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<sup>6</sup> Although appellant asserts at page 35 of his brief that there was a chemical analysis of the substance obtained from the informer prior to entry into the dwelling in *Mattus v. United States*, 9 Cir., 1926, 11 F. 2d 503, discussed infra, and asserts at page 37 of his brief that there was such an analysis made in *Garnes*, the opinions as reported made no mention of an analysis or field test. Thus, it would appear appellant is in error in the following statement at pages 43-44 of his brief:

"Finally, there is nothing whatsoever in any of these recent decisions to indicate that the Circuit Courts or the United States Supreme Court would justify an arrest as being predicated upon probable cause in the absence of a chemical determination of narcotics concerning the substance that has come from the room in which the arrest is sought to be made. This, if anything, appears to be the essential ingredient in order to predicate a finding of probable cause to permit an 'inside the room' arrest without a warrant of any kind. Absent such an ingredient, and such is most certainly absent in the instant situation, no court has ever held that probable cause existed to make an inside the room arrest."



act of selling three ounces of heroin to Narcotics Agent James Bailey. A few moments later they arrested Frank Gayles, whom Becknell pointed out to them as his source of supply. After questioning Becknell and Gayles, the agents learned that Gayles had obtained the narcotics that day from defendant and her paramour, George Wilson, at their apartment. Gayles further stated that the balance of an ounce of pure heroin from which he and Wilson had 'cut' the three ounces of narcotics delivered to Agent Bailey remained at defendant's apartment and that the agents could probably then find her in the apartment, and Wilson either with her or standing in front of one of two nearby bars. As Gayles had mentioned having previous dealings with Lubert, another Bureau of Narcotics Agent, the arresting agents checked on Gayles' reliability by telephoning that agent. He informed them that any information supplied by Gayles 'would be worth the trouble to find out if it was true or not'. At this point the agents had more than sufficient information to establish probable cause for defendant's arrest at her apartment; and the lateness of the hour, coupled with the danger of removal or destruction of the contraband the agents reasonably believed to be in the apartment, justified them in proceeding without a warrant. See *Johnson v. United States*, 333 U.S. 10, 14, 15, 68 S.Ct. 367, 92 L.Ed. 436".

In *Mattus v. United States*, 9 Cir., 1926, 11 F. 2d 503, the facts upon which a finding of probable cause to arrest without a warrant was based were set forth at page 504 as follows:

"It was shown that officers had instructed an informer, whom they first thoroughly searched to

ascertain whether he had narcotics on his person, to enter the defendant's house and with certain marked currency which was given him to purchase morphine; that they saw him enter the house and in a few minutes return therefrom and hand to the officers four packages of morphine; that thereupon the officers entered the house and arrested the defendant, and at the same time seized two packages of morphine which the defendant's wife was trying to conceal."

The facts here involved are substantially the same as in *Agnello, supra*, *Garnes, supra*, and *Mattus, supra*. Certainly, when Younger came out of room 304 of the Frye Hotel at 10 P.M. on March 25, 1958 and handed a "bundle" to agent Gooder, after he was furnished the marked money and went to Hopper's room to purchase narcotics from Hopper and after the conversation heard over the transom, the arresting officers had more than sufficient information to establish probable cause for defendant's arrest. Indeed they had a duty to arrest for a felony under the Washington narcotic laws contained in R.C.W., chapter 69.33. See also *Volkell v. United States*, 2 Cir., 1958, 251 F. 2d 333, cert. den. 356 U.S. 962, 78 S.Ct. 1000, 2 L.Ed. 2d 1068.

## III

THE ENTRY INTO APPELLANT'S HOTEL ROOM THROUGH AN OPEN DOOR DOES NOT RENDER THE ARREST AND THEREFORE THE SEARCH ILLEGAL.

In his Summary of Argument at page 11 of his brief, appellant contends that the arrest and search of appellant and his premises were unlawful because entry was made into appellant's room without the officers first giving notice of their authority and stating the purpose for which they demanded admission. This argument is based upon *Miller v. United States, supra*, [357 U.S. 301], which is discussed in Appellant's Brief commencing on page 39. But in *Miller* the issue was whether the arrest and therefore the search was unlawful under the law of the District of Columbia because the officers broke the door of petitioner's apartment to effect his arrest. *Miller, supra*, page 305. The government agreed with *Miller* that the validity of the breaking and entering to arrest without a warrant under District of Columbia law must be tested by criteria identical with those embodied in 18 U.S.C. §3109<sup>7</sup>. The Supreme Court stated at pages 305-306

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<sup>7</sup> 18 U.S.C. §3109:

"The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

that the validity of such an arrest is to be determined by state law but nevertheless reviewed this case for the reason set out at page 306 as follows:

"These statutory requirements are substantially identical to those judicially developed by the Court of Appeals for the District of Columbia in *Accarino v. United States*, 85 U.S. App. D.C. 394, 403, 179 F. 2d 456, 465. Since the rule of *Accarino* bears such a close relationship to a statute which is not confined in operation to the District of Columbia, we believe that review is warranted here."

We are not here nor was the Supreme Court in *Miller* concerned with the Fourth Amendment to the Constitution, but we are and the Court in *Miller* was concerned with the validity of an arrest under local law, *Miller, supra* [357 U.S. 301], at page 305. According to the court at pages 308 and 309, both the federal statute and the rule of *Accarino v. United States*, D.C. Cir., 1949, 179 F. 2d 456, were based on *Semayne's Case*, 5 Co. Rep. 91a, 11 E.R.C. 629, 77 Eng. Repr. 194. At page 308 the court quotes the following language from *Semayne's Case* at page 195 of 77 Eng. Repr.:

"In all cases where the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K[ing]'s process, if otherwise he cannot enter. *But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors . . .*' (Emphasis supplied.)"

The language of *Semayne's Case* not quoted by the Supreme Court in *Miller* is pertinent here:

"In all cases, when the door is open the sheriff may enter the house and do execution . . ."

and in the instant case the door through which the officers entered was open.

In connection with the historical development of these rules, Professor Wilgus in his article *Arrest Without a Warrant*, 22 Mich. L. Rev. 541, 673, 798, (1924)<sup>8</sup> states at page 800:

"There are two old maxims that seem inconsistent: 'Every man's house is his castle' and 'the king's keys unlock all doors.' These relate to different things; the first applies to civil process and the second to criminal process. An early dictum in the yearbook says: For a felony, or suspicion of felony, one may break into the dwelling house to take the felon, for it is for the common weal and to the interest of the King to take him; but it is otherwise as to debt or trespass; the sheriff or any other may not break into his dwelling to take him, for it is only for the private interest of the party.

"The leading case is *Semayne's Case* . . . The rules stated in this case still obtain. Breaking doors to arrest the owner or seize his property in a civil suit except to recover land is not allowed,

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<sup>8</sup>Cited in *Miller, supra*, (357 U.S. 301) at page 307, footnote 6; and by Judge Prettyman in *Accarino, supra*, (179 F. 2d 456) at 463. This subject is also discussed in an annotation at 5 A.L.R. 263.



although breaking into the house of another person is permitted, . . . Entry through an open door was allowed in either case."<sup>9</sup>

The common law rule permits a peaceful entry to effect an arrest. Such an entry is permitted in the District of Columbia with whose laws the Supreme Court was concerned in *Miller, Smith v. United States*, D.C. Cir., 1958, 254 F. 2d 751, 754, cert. den. 357 U.S. 937, 78 S.Ct. 1388, 2 L.Ed. 2d 1552; *Jennings v. United States*, D.C. Cir., 1957, 247 F. 2d 784, 785; and even where a door knob is turned to effect entry, *Ellison v. United States*, D.C. Cir., 1953, 206 F. 2d 476. In *Ellison* at page 479, the court said:

"This brings us to appellant's remaining contention: that the entry into the house was an invasion of his rights. Here, too, we must rule against him. If there was probable cause to make an arrest—as we hold there was—there was justification for at least the peaceable entry which here was made. *Martin v. United States*, 4 Cir., 1950, 183 F. 2d 436, certiorari denied 340 U.S. 904, 71 S.Ct. 280, 95 L.Ed. 554; *Morton v. United States*, 1945, 79 U.S. App. D.C. 329, 147 F. 2d 28, certiorari denied 324 U.S. 875, 65 S.Ct. 1015, 89 L.Ed. 1428. There is no need to determine whether consent was given: here the entry was proper regardless of consent".

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<sup>9</sup> In *Miller, supra*, (357 U.S. 301), at page 307, the Supreme Court apparently proceeds from the adage that a man's house is his castle though concerned with a criminal arrest.

The common law rule of *Semaynes' Case* is reflected in R.C.W. 10.31.040,<sup>10</sup> *Miller v. United States*, *supra*. [357 U.S.] at page 309, and distinguishes between a breaking and entering and entry through an open door. A peaceful entry to effect an arrest without a search or arrest warrant was upheld in *State v. Basil*, 1923, 126 Wash. 155, 217 Pac. 720, where the officers, in order to enter the house, were obliged to open the outer door which, although latched, was not locked. At page 157, the court said:

“Since the officers entered without invitation, the additional question is, does this fact render their entire acts so far unlawful that the liquors seized cannot be introduced in evidence on the trial of its possessor for unlawful possession. It is our opinion that the evidence was admissible. Conceding that the entry of the officers into the dwelling house was a trespass, it was but that and nothing more. It was not unlawful in the sense that they entered for an unlawful purpose. They had no purpose to search the dwelling for evidences of crime, nor purpose to commit any other wrongful or unlawful act therein. The dwelling was not locked against them, nor were they forbidden by the owner to enter. They therefore, committed no offense against the criminal statutes by entering in the manner they did enter; at most they committed a civil trespass.”

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<sup>10</sup>R.C.W. 10.31.040:

“To make an arrest in criminal actions, the officer may break open any outer or inner door, or windows of a dwelling house or other building, or any other inclosure, if, after notice of his office and purpose, he be refused admittance.”

Other Washington cases permitting peaceful entry to effect arrest are: *State v. Kittle*, 1926, 137 Wash. 173, 175, 214 Pac. 962; *State v. Dutcher*, 1927, 141 Wash. 627, 629, 251 Pac. 879; *State v. Llewellyn*, 1922, 119 Wash. 306, 309, 205 Pac. 394<sup>11</sup>. In *State v. Evans*, 1927, 145 Wash. 4, 13, 258 Pac. 845, and *State v. Thomas*, 1935, 183 Wash. 643, 645, 49 P. 2d 28, the court upheld entries into dwellings to search as incident to arrest even in the absence of defendants.

Although the Washington Constitution prohibits searches without "authority of law"<sup>12</sup> and is implemented by a statute<sup>13</sup> it is complied with where a search and seizure are incident to a lawful arrest. *State v. Cyr*, 1952, 40 Wn. (2d) 840, 843, 246 P. 2d 480 (opinion by Hamley, J.); *State v. McCollum*,

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<sup>11</sup> Federal cases permitting entry of a dwelling to effect an arrest on probable cause are *McBride v. United States*, 5 Cir., 1922, 284 Fed. 416, 418, cert. den. 261 U.S. 614, 43 S.Ct. 359, 67 L.Ed. 827; *Cardinal v. United States*, 6 Cir., 1935, 79 F. 2d 825, 826; *Rocchia v. United States*, 9 Cir., 1935, 78 F. 2d 966, 969; *Mattus v. United States*, *supra*, (11 F. 2d 503), at 504; cf. *Agnello v. United States*, *supra*, (269 U.S. 20) where the court upheld Agnello's arrest on probable cause where there was no search or arrest warrant without discussing the entry into Alba's dwelling to effect the arrest.

<sup>12</sup> Art. 1 §7 Washington Constitution:

"No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

<sup>13</sup> R.C.W. 10.79.040:

"It shall be unlawful for any policeman or other peace officer to enter and search any private dwelling house or place of residence without the authority of a search warrant issued upon a complaint as by law provided."

1943, 17 Wn. (2d) 85, 136 P. 2d 165; *State v. Thomas, supra*, [183 Wash. 643]; *State v. Much*, 1930, 156 Wash. 403, 411, 287 Pac. 57.

The rule in *Miller, supra*, [357 U.S. 301] is confined to forcible entry situations. *United States v. Garnes, supra*, [258 F. 2d 530]. The court in *Garnes* said at page 533:

“*Miller v. United States*, 78 S.Ct. 1190 and *Accarino v. United States*, 85 U.S. App. D.C. 395, 179 F. 2d 456, on which defendant relies, invalidate neither the arrest nor the search and seizure, since the rule of those cases is applicable only where arresting officers forcibly break into and enter a dwelling.”<sup>14</sup>

Since under the above reasoning a peaceful entry through an open door is permissible to effect an arrest under Washington law and since *Miller, supra*, [357 U.S. 301], does not apply to the instant situation, the entry into appellant's hotel room through an open door does not render the arrest and therefore the search illegal.

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<sup>14</sup> The appellant is in error when he states at page 43 of his brief, “Certainly, no case has limited the ruling in the *Miller* case, *supra*, to ‘forced entry’ situations, and it would seem reasonable to extend the *Miller* case ruling to entry by subterfuge situations.” Appellant in his brief has discussed extensively (pgs. 37-38, 42-43) the *Garnes* case quoted above. See also footnote 6.

## IV

THE SEARCH OF APPELLANT'S PERSON AND HIS HOTEL ROOM BEING INCIDENT TO HIS LAWFUL ARREST WAS OTHERWISE REASONABLE WITHIN THE REQUIREMENTS OF THE FOURTH AMENDMENT.

Because appellant places such reliance upon *Johnson v. United States, supra*, [333 U.S. 10] and *MacDonald v. United States*, 1948, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (Appellant's Brief, pages 20-21, 23-30, 35-38, 44, 47), the following brief discussion of searches incidental to arrest under the requirements of the Fourth Amendment is submitted, followed by a discussion of the *Johnson* and *MacDonald* cases and the impact of *Rabinowitz v. United States, supra*, [339 U.S. 56] upon them so that *Johnson* and *MacDonald* may be appraised in their proper perspective. In the background of the law of searches incidental to arrest the reasonableness of the search with which we are here concerned becomes evident.

The Fourth Amendment to the Constitution was the answer of the Revolutionary statesmen to the evils of unreasonable searches without warrants and searches with warrants unrestricted in scope. *Gouled v. United States*, 1921, 255 U.S. 298, 304, 41 S.Ct. 261, 65 L.Ed. 647; *Boyd v. United States*, 1886, 116 U.S.



616, 624, 625, 6 S.Ct. 524, 29 L.Ed. 746. An exception to the prohibition of this amendment existed where a search was made as incident to a lawful arrest.<sup>15</sup> *Weeks v. United States*, *supra*, [232 U.S. 383]. The basic roots of this exception are in the necessity of affording protection to the arrester; to deprive the prisoner of the potential means of escape and to avoid the destruction of evidence by the arrested person. *United States v. Rabinowitz*, *supra*, [339 U.S. 56] dissenting opinion of Frankfurter J. at page 72. From this it follows that officers may search and seize not only the things physically on the person arrested, but those within his immediate physical control. *Harris v. United States*, *supra*, [331 U.S. 145]; *Agnello v. United States*, *supra*, [269 U.S. 20]; *United States v. Rabinowitz*, *supra*, [339 U.S. 56]. The right exists to seize visible instruments of crime at the scene of

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<sup>15</sup> Another exception likewise rooted in necessity permits the search without warrant of moving vehicles because it is not practical to secure a warrant where a vehicle can be moved out of the jurisdiction. *Carroll v. United States*, 1925, 267 U.S. 132, 155, 156, 45 S.Ct. 280, 69 L.Ed. 543; *Brinegar v. United States*, 1949, 338 U.S. 160, 170, 69 S.Ct. 1302, 93 L.Ed. 1879.

It appears that appellant confuses probable cause to search moving vehicles and probable cause to arrest in his discussion of vehicle cases at pages 14-15 of his brief. Chief Justice Taft, speaking for the court in *Carroll*, *supra*, said at page 158:

"The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law."

arrest because such seizure involves no search; *Marron v. United States*, 1927, 275 U.S. 192, 198, 48 S.Ct. 74, 72 L.Ed. 231, and a dwelling may be searched incident to a valid arrest, *Harris v. United States, supra*, [331 U.S. 145]; *Agnello v. United States, supra*, [269 U.S. 20]. Each case, however, arising under the Fourth Amendment must be decided upon its own facts and circumstances. *Harris v. United States, supra*; *Go-Bart Co. v. United States*, 1931, 282 U.S. 344, 356, 51 S.Ct. 153, 75 L.Ed. 374.

In this background of search without warrant incident to arrest under the Fourth Amendment the Supreme Court decided *Johnson v. United States, supra*, [333 U.S. 10] in February 1948. This case is discussed at pages 19-20 of this brief. The court decided that there was no probable cause to arrest and said at pages 14-15 that there were exceptional circumstances such as flight of a suspect, threatened removal or destruction of evidence or contraband or where the thing to be searched is a moveable vehicle which would permit dispensing with a search warrant but that none of those circumstances were present in the Johnson case and therefore held the search to violate the defendant's rights under the Fourth Amendment. *Trupiano v. United States*, 334 U.S. 699, 78 S.Ct. 1229, 92 L.Ed.

1663, was decided five months later in June of 1948. The court there upheld an arrest on probable cause but rejected the contention that the seizure of contraband was incidental to the valid arrest in the absence of a search warrant. Relying upon the language from pages 14-15 of the *Johnson* case discussing the exceptional circumstances permitting a search without a warrant the court concluded at pages 706-708 that the validity of the search depended on the practicability of obtaining a search warrant. Since it was there conceded that an abundance of time existed during which a warrant could have been obtained the Court held there was error in admitting into evidence the seized contraband and reversed.

In December of 1948, the same year *Johnson* and *Trupiano* were decided, the Supreme Court had another occasion to pass upon the validity of a search without a warrant in *MacDonald v. United States*, *supra*, [335 U.S. 451]. There police officers broke and entered a rooming house through the landlady's room, walked upstairs and placed themselves in a position by looking over a transom where they saw the misdemeanor of conducting a lottery committed. The officers then entered the room and arrested the occupants. At pages 454-455, the Court, speaking through

Mr. Justice Douglas<sup>16</sup>, relying upon *Johnson* and *Trupiano*<sup>17</sup>, held that there was no compelling reason offered justifying the absence of a search warrant where the defendant's activities had been under surveillance for months and reversed for error in admitting the evidence obtained by an illegal search and seizure.

The next case in the development of the law of search incident to arrest and its relation to the Fourth Amendment was *Rabinowitz v. United States*, *supra*, [339 U.S. 56]. The court in *Rabinowitz* rejected the reasoning of *Trupiano*, *supra*, at page 66 as follows:

"To the extent that *Trupiano v. United States*, 334 U.S. 699, requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case is overruled. The relevant test is not whether it is reasonable to

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<sup>16</sup> This opinion was concurred in by Justice Black. Justice Rutledge concurred in the result without stating his reasons and Justice Jackson wrote a concurring opinion. Justice Frankfurter joined in the majority opinion and concurred in Justice Jackson's. Three justices dissented. Justice Jackson, the author of the *Johnson* opinion, did not rely on *Trupiano*, but said at pages 458-459 that the felony of breaking into the landlady's room being far more serious than the offense the officers were suppressing followed every step of their journey and "tainted its fruits with illegality".

<sup>17</sup> It appears that appellant is again in error when he states at page 28 of his brief:

"This decision (*MacDonald*) is based upon the rule announced in the *Johnson* case, *supra*, . . . and does not repose on the *Trupiano* ruling . . ."

procure a search warrant, but whether the search was reasonable."

The novel concept enunciated in the dictum of *Johnson* and made part of the law of searches and seizures by *Trupiano* and relied on in *MacDonald* was thus eliminated by *Rabinowitz* and the standard of *Harris v. United States, supra*, [331 U.S. 145] was reinforced, making a search incident to a lawful arrest turn on the question of reasonableness rather than upon the practicability of procuring a search warrant. To the extent that *Trupiano* depends on *Johnson* and *MacDonald* depends on *Johnson* and *Trupiano*, *Johnson* and *MacDonald* must fall insofar as they require a search warrant solely upon the basis of the practicability of procuring one rather than upon the reasonableness of a search incident to a lawful arrest.<sup>18</sup> The test of reasonableness of a search incident to a valid arrest "depends upon the facts and circumstances — the total atmosphere of the case", *Rabinowitz v. United States, supra*, [339 U.S. 56] at page 66 and "is in the first instance for the District Court to determine". *Rabinowitz v. United States, supra*, at page 63. The determination by that court upon a constitutional issue is not binding upon this court, but is en-

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<sup>18</sup>See Justice Frankfurter's dissenting opinion in *Rabinowitz v. United States, supra*, (339 U.S. 56) at pages 85-86.



titled to weight. *Blackford v. United States*, *supra*, [247 F. 2d 745], at page 751.

Appellant mistakes the impact of *Rabinowitz* upon this aspect of *Johnson* and *MacDonald* for he apparently contends at pages 10-11 of his brief that the officers here should have gone before a magistrate and sought a search<sup>19</sup> or arrest<sup>20</sup> warrant prior to their entry into his hotel room to effect his arrest.

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<sup>19</sup> Rule 41(c) of the Federal Rules of Criminal Procedure provides in pertinent part:

"If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched . . . The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at anytime." (Emphasis supplied).

In view of these requirements it would appear doubtful that the officers here involved could have obtained a search warrant daytime or night time prior to 9:40 P.M. on March 25, 1958 when they were outside room 304, Frye Hotel, because they did not know where the narcotics were, unlike *United States v. Johnson*, *supra*, (333 U.S. 10). The narcotics could well have been located in a stairway, closet, elevator, other hotel room or even somewhere outside the hotel. Accordingly, there was no probable cause to search a place which could be particularly described. *Steel v. United States*, 1925, 267 U.S. 498, 503, 45 S.Ct. 414, 69 L.Ed. 757; *United States v. Innelli*, D.C. E.D. Pa., 1923, 286 Fed. 731, 732, 733; *United States v. Hinton*, 7 Cir., 1955, 219 F. 2d 324, 325, 326; *United States v. Brown*, D.C. E.D. Va., 1957, 151 F. Supp. 441.

<sup>20</sup> Rule 4(a) of the Federal Rules of Criminal Procedure provides in pertinent part:

"If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue . . ."

Prior to 9:40 P.M. on March 25, 1958, it would appear doubtful

In answer to such argument the following language from *Rabinowitz*, at page 65, is appropos:

"A rule of thumb requiring that a search warrant always be procured whenever practicable may be appealing from the vantage point of easy administration. But we cannot agree that this requirement should be crystallized into a *sine qua non* to the reasonableness of a search. It is fallacious to judge events retrospectively and thus to determine, considering the time element alone, that there was time to procure a search warrant. Whether there was time may well be dependent upon considerations other than the ticking off of minutes or hours. The judgment of the officers as to when to close the trap on a criminal committing a crime in their presence or who they have reasonable cause to believe is committing a felony is not determined solely upon whether there was time to procure a search warrant. Some flexibility will be accorded law officers engaged

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that the officers could have obtained a warrant of arrest for appellant for delivery of narcotics to Younger earlier in the day or for concealment of narcotics for the only information the officers then had was the as yet unverified word of the informer. Cf. *Draper v. United States*, *supra*, (27 L.W. 4085) at 4086; *Carter v. United States*, 5 Cir., 1956, 231 F. 2d 232, cert. den. 351 U.S. 948, 76 S.Ct. 1052, 100 L.Ed. 1948; *Wrightson v. United States*, D.C. Cir., 1955, 222 F. 2d 556; *United States v. Li Fat Tong*, 2 Cir., 1945, 152 F. 2d 650; *United States v. Castle*, D.C. D.C., 1955, 138 F. Supp. 436 at 439. *United States v. Heitner*, 2 Cir., 1945, 149 F. 2d 105, 106 appears to permit an arrest solely upon the basis of hearsay, but there the arrest was made after the defendant, upon seeing the officers, tried to get away. See also *Giordenello v. United States*, 1958, 357 U.S. 480, 485, 78 S.Ct. 1245, 2 L.Ed. 2d 1503.

Appellant's argument here appears to be that prior to 9:40 P.M. the officers had sufficient information to establish probable cause for purposes of obtaining an arrest warrant but at 10:00 P.M., after Younger came out of Hopper's room and delivered a "bindle" of heroin to agent Gooder they did not have probable cause to arrest.

in daily battle with criminals for whose restraint criminal laws are essential."

The search in the instant case was of appellant's person from which the government currency was recovered. The seizure of the contraband was made in appellant's hotel room after the officers struggled to obtain it from the appellant's person. It appears obvious that appellant was attempting to destroy or remove these narcotics. Under these circumstances it appears clear that the search incident to a valid arrest was reasonable and did not violate appellant's rights under the Fourth Amendment. *Rabinowitz v. United States, supra*, [339 U.S. 56]; *Harris v. United States, supra*, [331 U.S. 145]; *Agnello v. United States, supra*, [269 U.S. 20].

## CONCLUSION

As Chief Justice Vinson said in *Harris, supra*, [331 U.S. 145] at page 155,

“ . . . we should not permit our knowledge that abuses sometimes occur [during the course of criminal investigations] to give sinister coloration to procedures which are basically reasonable.”

For the reasons above set forth, appellee respectfully submits that the search which occurred during the investigation of this case was reasonable and incidental to a valid arrest; that the District Court did not err in denying appellant's motion for return of property and to suppress evidence and did not err by permitting appellee to introduce Exhibits 1, 2 and 4 into evidence during the trial. Accordingly, appellant's conviction should be affirmed.

Respectfully submitted,

CHARLES P. MORIARTY  
*United States Attorney*

JEREMIAH M. LONG  
*Assistant United States Attorney*

No. 16195

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United States  
Court of Appeals  
for the Ninth Circuit

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UNITED STATES OF AMERICA,  
Appellant,  
vs.  
BIENVENIDO VICTORIO SISON,  
Appellee.

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Transcript of Record

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Appeal from the United States District Court for the Northern  
District of California, Southern Division

FILED

JAN 29 1958

PAUL P. O'BRIEN, CLERK





No. 16195

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United States  
Court of Appeals  
for the Ninth Circuit

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UNITED STATES OF AMERICA,  
Appellant,  
vs.

BIENVENIDO VICTORIO SISON,  
Appellee.

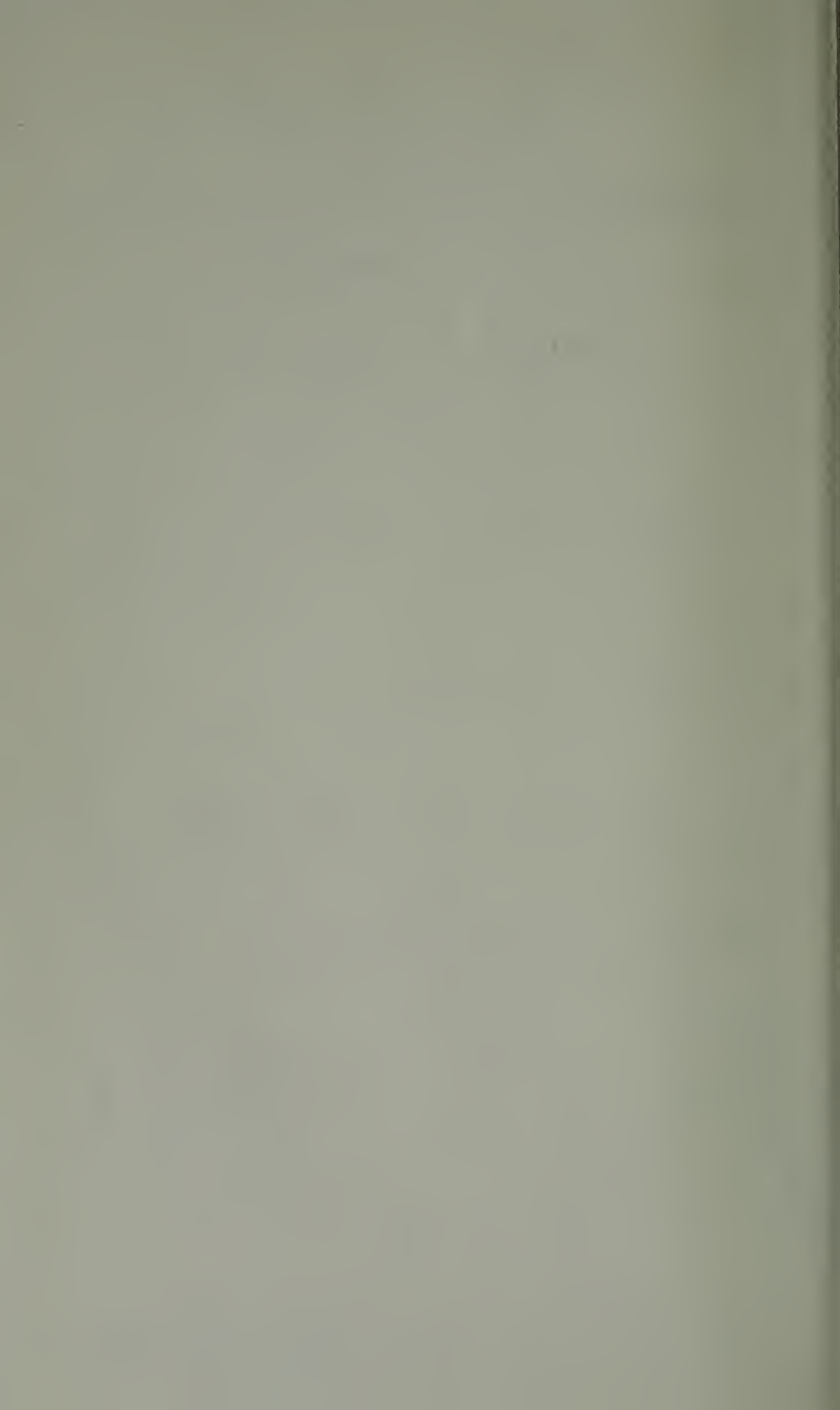
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Transcript of Record

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Appeal from the United States District Court for the Northern  
District of California, Southern Division

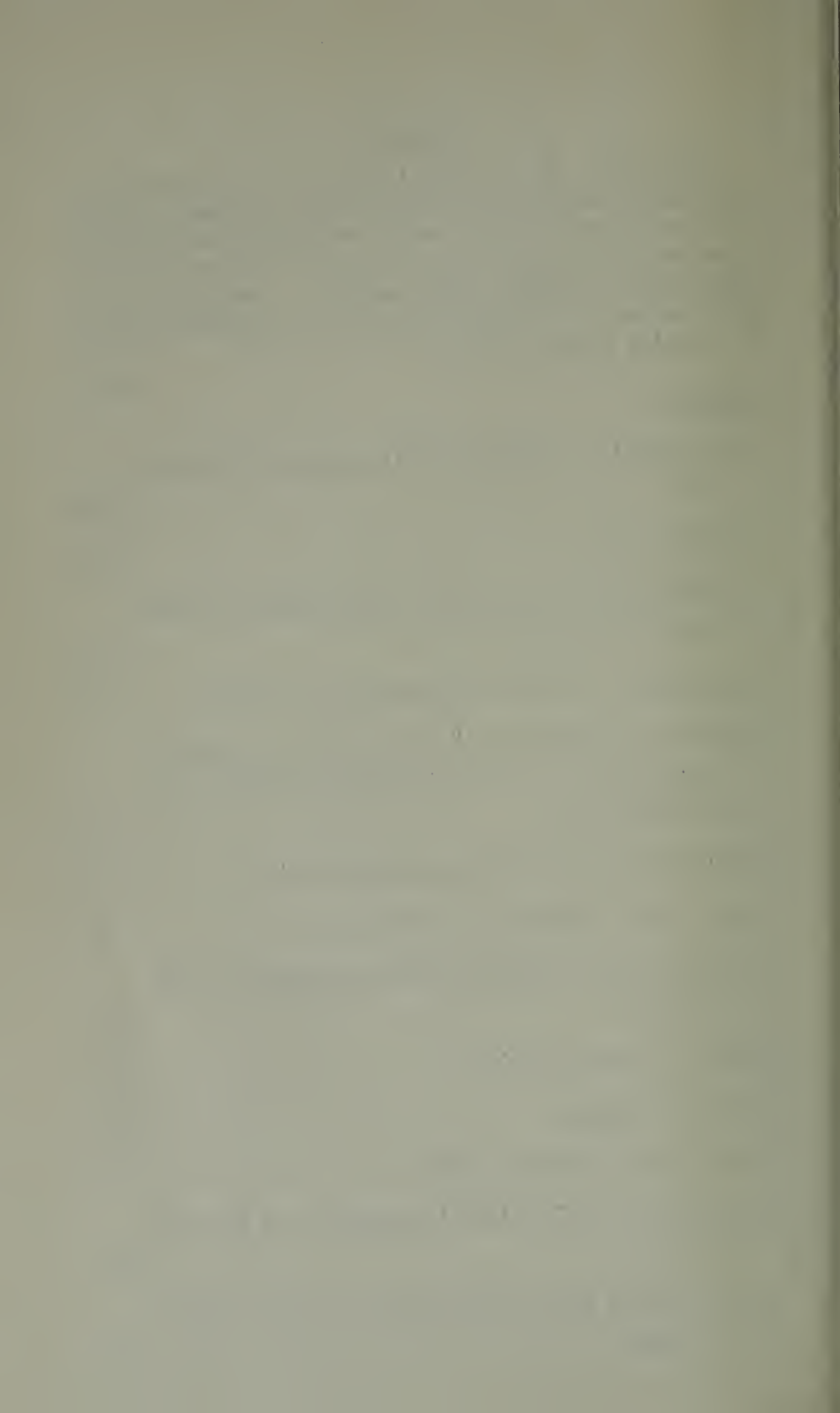
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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For Appellee.



United States of America

No. 130662

PETITION FOR NATURALIZATION

Section 324 (a) of the Nationality Act of 1940 and  
405 of the I. & N. Act

To the Honorable the District Court of the United  
States of San Francisco, Calif.:

This petition for naturalization, hereby made  
and filed, respectfully shows:

(1) My full, true, and correct name is Bien-  
venido Victorio Sison.

(2) My present place of residence is 909 Laguna  
St., #101, San Francisco, Calif.

(3) My occupation is Disabled WW II Veteran.

(4) I was born on Dec. 23, 1921, in Agoo, La  
Union, P. I.

(5) My personal description is as follows: Sex  
M, complexion dark, color of eyes brown, color of  
hair black, height 5 feet 5 inches, weight 112  
pounds, visible distinctive marks mole near rt. eye;  
country of which I am a citizen, subject, or na-  
tional Philippine Republic.

(6) I am married; the name of my wife is  
Eduarda, we were married on July 6, 1946, at  
Agoo, LaUnion, P. I.; she was born at Agoo, Lall-  
mon, P. I., Oct. 13, 1928, and entered the United

States at—never for permanent residence in the United States and now resides at Agoo, P. I. \* \* \*

(7a) (If petition is filed under section 319 (a), Immigration and Nationality Act.) I have resided in the United States in marital union with my United States citizen spouse for at least 3 years immediately preceding the date of filing this petition for naturalization, and have been physically present in the United States at least half of that time.

(7b) (If petition is filed under section 319 (b), Immigration and Nationality Act.) My husband or wife is a citizen of the United States, is in the employment of the Government of the United States, or of an American institution of research recognized as such by the Attorney General of the United States, or an American firm or corporation engaged in whole or in part in the development of foreign trade and commerce of the United States, or subsidiary thereof or of a public international organization in which the United States participates; and such husband or wife is regularly stationed abroad in such employment. I intend in good faith upon naturalization to live abroad with my spouse and to resume my residence within the United States immediately upon termination of such employment abroad.

8. I have four children; and the name, sex, date and place of birth, and present place of residence of each of said children who is living, are as follows:

Juan—M—Agoo, LaUnion, P. I.—Dec. 27, 1946  
—Agoo, LaUnion, P. I.

Ernani Brigida—F—Agoo, LaUnion, P. I.—  
Oct. 8, 1948—Agoo, LaUnion, P. I.

Luiz—M—Agoo, LaUnion, P. I.—June 21, 1950  
—Agoo, LaUnion, P. I.

Teofilo—M—Agoo, LaUnion, P. I.—May 19, 1952  
—Agoo, LaUnion, P. I.

I entered the U. S. Army at Fort Mills, Philippine Islands on July 18, 1941 under Serial No. 10305626 and was honorably discharged August 22, 1945.

Form N-440 attached hereto and made a part hereof.

(11) It is my intention in good faith to become a citizen of the United States and to renounce absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state or sovereignty of whom or which at this time I am a subject or citizen. (12) It is my intention to reside permanently in the United States. (13) I am not and have not been for a period of at least 10 years preceding the date of this petition a member of or affiliated with any organization proscribed by the Immigration and Nationality Act or any section, subsidiary, branch affiliate or subdivision thereof nor have I during such period engaged in or performed any of the acts or activities prohibited by that Act. (14) I am able to read, write



and speak the English language (unless exempted therefrom). (15) I am, and have been during all the periods required by law, a person of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States, I am willing, if required by law, to bear arms on behalf of the United States, to perform non-combatant service in the Armed Forces of the United States, and to perform work of national importance under civilian direction (unless exempted therefrom.) \* \* \*

(18) Attached hereto and made a part of this, my petition for naturalization, are the affidavits of at least two verifying witnesses required by law.

(19) Wherefore I, your petitioner for naturalization, pray that I may be admitted a citizen of the United States of America, and that my name be changed to Victor Sison. I, aforesaid petitioner, do swear (affirm) that I know the contents of this petition for naturalization subscribed by me, and that the same are true to the best of my knowledge and belief, and that this petition is signed by me with my full, true name: So Help Me God.

/s/ BIENVENIDO VICTORIO SISON

Alien Registration No. A10 838 317.

Form N-405

Affidavit of Witnesses

The following witnesses, each being severally, duly, and respectively sworn, depose and say:

(1) My name is Loreto C. Ordona, my occupation is U. S. Army. I reside at "C" Co., Presidio, San Francisco, Calif.

(2) My name is Felix G. Domondon, my occupation is Laborer. I reside at 763 Minna St., San Francisco, Calif.

I am a citizen of the United States of America; I have personally known and have been acquainted in the United States with the petitioner named in the petition for naturalization of which this affidavit is a part, since at least August 1956. I have personal knowledge that the petitioner is, and during all such periods has been a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States, and in my opinion the petitioner is in every way qualified to be admitted a citizen of the United States.

I do swear (affirm) that the statements of fact I have made in the affidavit to this petition for naturalization subscribed by me are true to the best of my knowledge and belief; So Help Me God.

/s/ LORETO C. ORDONA  
(Signature of Witness)

/s/ FELIX G. DOMONDON  
(Signature of Witness)

When Oath Administered by Designated  
Examiner

Subscribed and sworn to (affirmed) before me by

above-named petitioner and witnesses in the respective forms of oath shown in said petition and affidavit at San Francisco, California, this 10th day of July, 1957.

/s/ F. G. BURNS,  
Designated Examiner

I Hereby Certify that the foregoing petition for naturalization was by petitioner named herein filed in the office of the clerk of said court at San Francisco, California, this 10th day of July, A. D. 1957.

[Seal] C. W. CALBREATH,  
Clerk

/s/ DOROTHY EDINGER,  
For the Clerk

#### Oath of Allegiance

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and the laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same;

that I will bear arms on behalf of the United States when required by law;

that I will perform noncombatant service in the Armed Forces of the United States when required by law;

that I will perform work of national importance under civilian direction when required by the law;

and that I take this obligation freely without any mental reservation or purpose of evasion; So Help Me God. In acknowledgment whereof I have hereunto affixed my signature.

/s/ BIENVENIDO VICTORIO SISON

/s/ VICTOR SISON,

(Signature of Petitioner)

Sworn to (affirmed) in open court, this 15th day of July, A. D. 1958.

C. W. CALBREATH,

Clerk

/s/ By ETTA G. STEPHENSON,

Deputy Clerk

Petition granted: Line No. .... of List No. 3150, and Certificate No. 7739554 issued.

Petition denied: List No. 3112—Mar. 19, 1958—cont'd 15 days for Gov't briefs; submitted for decision as of April 4, 1958. June 30, 1958—Memorandum and Order that petitioner be admitted upon taking required oath—Order filed herewith.

In the District Court of the United States in and for the Northern District of California, Southern Division, at San Francisco, California.

Petition No. 130662

Petition for Naturalization of BIENVENIDO VICTORIO SISON

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION OF DESIGNATED NATURALIZATION EXAMINER

To the Honorable, the Judges of the District Court of the United States in and for the Northern District of California, Southern Division:

1. The undersigned, duly designated under the Immigration and Nationality Act to conduct preliminary examinations upon petitions for naturalization, respectfully submits that this petitioner, a native and national of the Philippine Islands, age 36 years, filed this petition for naturalization on July 10, 1957, under Section 324 (a) of the Nationality Act of 1940 and Section 405 (a) of the Immigration and Nationality Act of 1952.

Issue: Eligibility of Petitioner Under Any Applicable Statute.

2. Statement of Facts

Petitioner was born on December 23, 1921, at Agoo, La Union Province, Republic of the Philip-



pires. He is married and has four children. Both his wife and children are in the Philippines.

He was admitted to the United States for the first and only time on July 1, 1956, as a temporary visitor for medical treatment.

He entered the Philippine Scouts at Fort Mills in the Philippines on July 18, 1941, and served honorably therein in an active-duty status from July 18, 1941, to August 22, 1945, when he was honorably discharged. He received a medical discharge based on disabilities resulting from wounds he had received. On March 13, 1957, he was given a 40% disability rating by the Veterans Administration for his condition.

He filed this petition on July 10, 1957, under Section 324 (a) of the Nationality Act and Section 405 (Savings Clause) of the Immigration and Nationality Act of 1952.

### 3. Discussion and Authorities

Because of the many and important facts of the case, a brief summary of our position at the outset would be in order, viz.,

(1) Petitioner does not meet the eligibility requirements under the Immigration and Nationality Act of 1952;

(2) While petitioner may have had a "status" for naturalization under Section 702 of the Nationality Act of 1940, this section expired under its own terms on December 31, 1946, and hence cut off any such "right in process of acquisition".

(3) Petitioner had no status which could have been preserved to him under Section 324 of the Nationality Act of 1940 because that section provides for judicial naturalization and the petitioner never having been out of the Philippines was not within the jurisdiction of any naturalization court. Even under *Menasche* (348 U.S. 528), therefore, he could not be said to have a right in process of acquisition because he had never in any manner entered the United States as to submit himself to the jurisdiction of a naturalization court. There is nothing saved to him, therefore, by Section 405 (a) of the 1952 Act because he was not eligible for naturalization under Section 324.

Petitioner does not meet the eligibility requirements under the Immigration and Nationality Act of 1952. The petition was not filed while he was still in the service or within six months after the termination of the service. Hence, 8 U.S.C. 1439 (a) is not applicable. Nor can he meet the residence requirements of Section 1439 (d). Section 1440 of Title 8 requires that a petitioner must have been in the United States, the Canal Zone, American Samoa, or Swain's Island, at the time of enlistment or induction whether or not he had been lawfully admitted for permanent residence or the petitioner must have been lawfully admitted for permanent residence at any time subsequent to enlistment or induction. This petitioner meets neither requirement. Nor is 8 U.S.C. 1440 (a) applicable. That statute covers service after June 24, 1950.

It remains to be determined, then, whether peti-

tioner was eligible to be naturalized under any provisions of the Nationality Act of 1940 and, if so, whether the Savings Clause of the present Act preserves any rights existing upon repeal of the Act. Two sections of the 1940 Act are apposite, sections 324, as amended, and Section 701, as amended.

Section 324 was essentially a peace time provision but apparently applied during peace or war. Section 701 applied only to those serving in World War II. It did not expressly repeal Section 324 and since it did not conflict with the latter there was no repeal by implication. Section 701 was applicable to "any person not a citizen" notwithstanding he was not within the racially eligible classes described in Section 303 of the 1940 Act.

Petitioner had the requisite three years honorable service in the Army and would have been entitled to the exceptions specified in Section 324 (b) had he filed a petition while still in the service or within six months after the termination thereof.

Petitioner could only have been naturalized if he had been in the jurisdiction of a naturalization court. Physical presence in the United States, whether pursuant to legal admission or not, was essential. (The term "United States" when used in a geographical sense in the 1940 Act meant "the continental United States, Alaska, Hawaii, Puerto Rico, and the Virgin Islands of the United States" 8 U.S.C. 501 (4), 1946 ed.)

Naturalization under this section was judicial, and, unlike Section 702 naturalizations could only

take place in courts exercising naturalization jurisdiction. (According to our information, no courts ever exercised naturalization jurisdiction in the Philippine Islands. See also former 8 U.S.C. 701 (a) vesting naturalization jurisdiction on specified courts in the continental United States and for those possessions included in the definition of "United States" by former Section 101 (d) of the 1940 Act.)

The waiver of Section 324 (a) was not of a continuous residence but of the minimum requirements generally imposed on petitioners. This is evident from the wording of subsection (d). (Lawful entry was not a condition to naturalization under Section 324 in so far as the Ninth Circuit is concerned. *Yuen Jung v. Barber*, 184 F. 2d 491. See also *In re Fleishman*, 49 F. Supp. 223 (W.D. N.Y. 1943); contra, *Petition of Gislason*, 47 F. Supp. 46 (D. of Mass. 1942) The Service view was that the residence need not be pursuant to legal admission)

Under Section 324 (d) a petitioner had to comply with the continuous residence requirements of five years in the United States and six months in the state in which the petition was filed, immediately preceding the date of filing of the petition, except that the service was to be considered as residence within the United States or the state. Petitioner did not have the requisite residence since he did not arrive in the United States until 1956, approximately  $3\frac{1}{2}$  years after the 1940 Act was repealed, even if he could have counted the period of his service as residence in the United States under the



exception in Section 324 (a), which we do not believe is permissible.

The only reasonable interpretation we can place on that exception is that only service performed within the five year period immediately preceding the date of the filing of the petition can be counted towards the requisite residence under Section 324 (d). Under Section 324 (c) even a petitioner still in the service when he petitions must prove residence, good moral character, attachment, etc., during any gap in service occurring within the five year period immediately preceding the filing of the petition. It seems incredible that Congress could have intended to exempt petitioners from such proof merely because they had completed a certain period of service before the five year period even began. We think the only reasonable interpretation is that service performed during the five year period immediately preceding the filing of the petition could be considered residence. (Under Section 328 (d) of the 1952 Act (8 U.S.C. 1429 (d) only service within five years immediately preceding the date of filing such petition shall be considered as residence and physical presence within the United States. "This provision \* \* \* carries forward substantially the provisions of existing law in Section 324 of the Nationality Act of 1940". Senate Report 1137 (82nd Congress 2nd Session).

We do not believe petitioner gains anything even if it is assumed Section 2 of the Act of August 16, 1940, was not repealed until the effective date of the present Act (Appendix page 1) since he had



not filed his petition prior to December 24, 1952. And we think there was a repeal by implication. Section 301 (d) of the Nationality Act of 1940 (former 8 U.S.C. 701 (d)) provided that "a person may be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this chapter and not otherwise". Section 504 of the 1940 Act (former 8 U.S.C. 904) repealed all Acts or parts of Acts in conflict with its provisions except for the purposes of Section 746, the penal provisions. If the Act of August 16, 1940, was not inconsistent with Section 324 it most certainly conflicted with Sections 701 and 324 A of the 1940 Act.

With respect to the petitioner's eligibility for naturalization under former Section 701, it appears there was a period of time up to and including August 22, 1945 (the date of petitioner's discharge) when he could have been naturalized had there been a designated representative of the Immigration Service stationed in the area where he then was present.

Section 701 of the 1940 Act expired by its own terms on December 21, 1946. It was supplemented by Section 324 A (June 1, 1948). Under the latter a petitioner had to be (1) at the time of enlistment or induction in the United States or an outlying possession, including the Panama Canal Zone, but excluding the Philippine Islands or (2) at any time subsequent to enlistment or induction had to be lawfully admitted for permanent residence. So, this petitioner was ineligible under either alternative.

So, the Savings Clause of the present Act avails petitioner nothing in so far as Section 701 is concerned. The Savings Clause continues "The statutes or parts of statutes repealed" as to all proceedings, rights, acts, etc. Here, Section 701 was not in existence on December 24, 1952, and petitioner had no "right" or "status" or "condition" arising under Section 701 to be saved, cf. applications of Tano, etc. 139 F. Supp. 797, (N.D. Cal. 1955) affirmed per curiam, 237 F. 2d 916 (C.A. 9).

We have to this point purposely omitted any discussion as to what rights if any, petitioner acquired and were preserved by reason of his military service.

We do not question that the performance of honorable military service gave this petitioner a "status" for naturalization purposes prior to the 1952 Act. But the difficulty with the situation is this: Under what circumstances could petitioner use this service? If he had been in the jurisdiction of a naturalization court he could have used such service as residence only if it was performed within five years immediately preceding the filing of the petition. Had he filed a petition, for example on August 22, 1949, he could have used his service from July 18, 1941, to August 22, 1945, (the date of his discharge) towards residence. If he had been in the military service on August 22, 1949, however, he could have been naturalized immediately upon filing the petition under Section 324 (a). So, it is difficult to see how this military service "status" benefits petitioner under a petition filed

July 10, 1957. No period of his service was performed between July 10, 1952, and that date.

If Section 324 (a) spoke only of military service without certain conditions as to when that service was performed in relation to the date when the petition was filed, the broad sweep of the Menasche decision (348 U.S. 528) might apply. In Menasche the respondent was not eligible for naturalization under prior law, as he had not completed the requisite five years of United States residence. But he did have some residence which created a right in the process of acquisition. Here, petitioner had no residence on December 24, 1952 (effective date of the 1952 Act) and residence plus military service were prerequisite under Section 324 when the petition was not filed while petitioner was still in the service. *Pringle* (U.S. v. *Pringle* 212 F. 2d 78 (C.A. 4), of course, had completed the requirements under the old Act. *Jocson* (In re *Jocson*, 177 F. Supp.) was still in the service when he filed his petition; *Aure* (*Aure* v. U.S. 225 F. 2d 88 (C.A. 9)), also was still in the service when he filed his petition. See also In re *Ponschart's* Petition, 140 F. Supp. 485 (S.D. N.Y. 1956). See also *Petition of Strate*, 131 F. Supp. 786 (E.D. Pa.), affirmed per curiam, 223 F. (2) 470, where the petitioner was allowed to use his military service (World War I) twice. This decision is not in point, however, since there petitioner met the requirements of former Section 324 A. This petitioner could not avail himself of the section for the reason stated above.

Contra: In re De Mayo's Petition, 146 F. Supp. 759, in which the District Court, Harris J. concluded that petitioner enjoyed a certain "status" or "condition" when he completed his tour of duty in 1946 and that this was a substantive right which survived the repeal of the Nationality Act of 1940 and petitioner could utilize his service in computing the five years residence required; also see Memorandum opinion 12 In the Matter of Mike Shaltupsky Moore, J. filed April 17, 1942, (attached).

4. Pursuant to the provisions of Section 335 of the Immigration and Nationality Act of 1952, the following findings of fact and conclusions of law are made:

### Findings of Fact

#### I.

That the petitioner is an alien and filed a petition for naturalization on July 10, 1957, under the provisions of Section 324 (a) of the Nationality Act of 1940 and Section 405 (a) of the Immigration and Nationality Act of 1952;

#### II.

That the petitioner entered the Philippine Scouts at Fort Mill, P. I. on July 18, 1941, and served honorably therein in an active-duty status from July 18, 1941, to August 22, 1945, when he was honorably discharged;

#### III.

That the petitioner was admitted to the United

States for the first and only time on July 1, 1956, as a temporary visitor for medical treatment.

### Conclusions of Law

#### I.

That the petitioner has failed to establish eligibility for naturalization under the Immigration and Nationality Act of 1952;

#### II.

That the petitioner has failed to establish eligibility for naturalization under Section 324 (a) of the Nationality Act of 1940;

#### III.

That the petitioner has failed to establish that he acquired any rights by reason of his military service which were preserved by Section 405 of the Immigration and Nationality Act of 1952.

#### 5. Recommendation

It is respectfully recommended that this petition be denied upon the grounds that the petitioner has failed to establish his eligibility for naturalization under any applicable statute.

Respectfully submitted,

/s/ DANIEL H. LYONS,

Designated Naturalization Examiner

Date: March 19, 1958.



Original

List No. 3112

NATURALIZATION PETITIONS RECOMMENDED TO BE DENIED

To the Honorable the District Court of the United States sitting at San Francisco, California:

C. A. Antonioli, F. J. Burns, J. S. Hemmer, H. E. Hosier, D. H. Lyons, H. Z. Smith duly designated under the Immigration and Nationality Act to conduct preliminary examinations upon petitions for naturalization to the above-named Court and to make findings and recommendations thereon, has personally examined under oath at a preliminary examination the following twenty-eight (28) petitioners for naturalization and their required witnesses, has found for the reasons stated below, that such petitions should not be granted, and therefore recommends that such petitions be denied.

1. Petition No. 76468; name of Petitioner Frank Carlson; reason for Denial, Withdrawn by petitioner.
2. Petition No. 89943; name of Petitioner, Jack Warnick; reason for denial, lack of prosecution.
3. Petition No. 121039; name of Petitioner, Tommy Orville Prescott; reason for denial, eligibility.
4. Petition No. 121819; name of Petitioner, George Sing; reason for denial, eligibility.

5. Petition No. 127348; name of Petitioner, Julia Ginger; reason for denial, lack of prosecution.

6. Petition No. 127913; name of Petitioner, Anna Nikoliw; reason for denial, lack of prosecution.

7. Petition No. 128113; name of Petitioner, Jose Roberto Aguilar, reason for denial, lack of prosecution.

8. Petition No. 128326; name of Petitioner, Ali Saad Zamzami; reason for denial, lack of prosecution.

9. Petition No. 128507; name of Petitioner, Anna Arsenii Kolovos; reason for denial, lack of prosecution.

10. Petition No. 128616; name of Petitioner, Giuseppe Brasillo; reason for denial, lack of prosecution.

11. Petition No. 128715; name of Petitioner, Franziska Era Nemoff; reason for denial, lack of prosecution.

12. \* \* \* \* \*

13. Petition No. 129040; name of Petitioner, Jose Gonzalez; reason for denial, lack of prosecution.

14. Petition No. 129247; name of Petitioner, John Herger; reason for denial, lack of prosecution.

15. Petition No. 129434; name of Petitioner, Evangelina Foran; reason for denial, lack of prosecution.

16. Petition No. 129495; name of Petitioner,

Rito Ramirez; reason for denial, lack of prosecution.

17. Petition No. 129724; name of Petitioner, Macaria Alava Bartolome; reason for denial, lack of prosecution.

18. Petition No. 129951; name of Petitioner, Akilina Ninaud; reason for denial, lack of prosecution.

Sheet No. 2

1. Petition No. 129956; name of Petitioner, Theresa Mertley; reason for denial, lack of prosecution.

2. Petition No. 130662; name of Petitioner, Bienvenido Victorio Sison; reason for denial, eligibility.

3. Petition No. 130731; name of Petitioner, Francis Camilleri; reason for denial, lack of prosecution.

4. Petition No. 130894; name of Petitioner, Frieda Bercea; reason for denial, lack of prosecution.

5. Petition No. 130932; name of Petitioner, Maria Da Conceicao Cunha; reason for denial, lack of prosecution.

6. Petition No. 130977; name of Petitioner, Antero Merlan; reason for denial, eligibility.

7. Petition No. 131431; name of Petitioner, Matthew Daly; reason for denial, eligibility.

8. Petition No. 131715; name of Petitioner, Homero Valdespino; reason for denial; good moral character not established.

9. Petition No. 131729; name of Petitioner,

Marie Fleurance Antonia Wilson; reason for denial, withdrawn by petitioner.

10. Petition No. 131870; name of Petitioner, Leonico Ramirez Tabinga; reason for denial, eligibility.

11. Petition No. 132907; name of Petitioner, Pedro Fermin Bade; reason for denial, withdrawn by petitioner.

12. Petition No. 132875; name of Petitioner, Roger Kwek Chun; reason for denial, withdrawn by petitioner.

Respectfully submitted,

/s/ DANIEL H. LYONS,

(Signature of officer in attendance  
at final hearing)

Date: March 19, 1958.

[Endorsed]: Filed March 19, 1958.

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Original

Order No. 3112

ORDER OF COURT DENYING PETITIONS  
FOR NATURALIZATION

United States of America,  
Northern District of California—ss.

In the District Court of the United States at San  
Francisco, California.

Upon consideration of the petitions for naturalization recommended to be denied, listed on List No. 3112 sheets 1 to 2 dated March 19, 1958, presented in open Court this 19 day of March, A. D.,

1958, It Is Hereby Ordered that each of the said petitions, except those petitions listed below, be, and hereby is, denied.

It Is Further Ordered that petitions listed below be continued for the reasons stated:

Petition No. 129956; name of Petitioner, Theresa Mertley; cause of continuance, off calendar.

Petition No. 121039; name of Petitioner, Tommy Orville Prescott; cause of continuance, cont. 15 days for Govt. briefs; submitted for decision as of April 4, 1958.

Petition No. 121819; name of Petitioner, George Sing; cause of continuance, cont. 15 days for Govt. briefs; submitted for decision as of April 4, 1958.

Petition No. 130662; name of Petitioner, Bienvenido Victorio Sison; cause of continuance, cont. 15 days for Govt. briefs; submitted for decision as of April 4, 1958.

Petition No. 130977; name of Petitioner, Antero Merlan; cause of continuance, cont. 15 days for Govt. brief; submitted for decision as of April 4, 1958.

Petition No. 131870; name of Petitioner, Leonico Ramirez Tabinga; cause of continuance, cont. 15 days for Govt. briefs; submitted for decision as of April 4, 1958.

By the Court, this 19 day of March, 1958.

/s/ OLIVER J. CARTER,  
Judge

[Endorsed]: Filed March 19, 1958.



In the United States District Court for the Northern District of California, Southern Division

Petition No. 130662

In the Matter of the Petition for Naturalization  
of BIENVENIDO VICTORIO SISON

Petition No. 130977

In the Matter of the Petition for Naturalization  
of ANTERO MERLAN

Petition No. 131870

In the Matter of the Petition for Naturalization  
of LEONICO RAMIREZ TABINGA

### MEMORANDUM AND ORDER

The petitioners are all natives of the Philippine Islands; all have served honorably in the armed forces; all have been legally admitted to the United States; and all have combined periods of service and domestic residence in excess of five years.

The Naturalization Examiner has recommended that the petitions be denied upon the ground that the petitioners have failed to meet the residence requirements for naturalization under 8 U.S.C. 1439.

The problem is not one of first impression in this Court. A petition was granted upon facts substantially similar to those set out in the matters at bar

in re De Mayo's Petition, 146 F. Supp. 759 (D.C. N.D. Cal. 1956). As in the DeMayo case, each petitioner here has acquired a status by virtue of his service in the armed forces, *U. S. v. Menasche*, 348 U.S. 528, which status was preserved under the saving clause of the 1952 Immigration and Naturalization Act, *Aure v. U. S.*, 225 F. 2d 88, (9th Cir., 1955).

The Court sees no reason why it should not follow this prior interpretation of the Immigration and Naturalization laws by a Judge of this District Court. Accordingly, the petitioners are eligible to become naturalized citizens of the United States of America.

It Is Ordered that the petitions be, and the same hereby are granted, and the petitioners will be admitted upon taking the required oath.

Dated: June 30, 1958.

/s/ OLIVER J. CARTER,

United States District Judge

[Endorsed]: Filed June 30, 1958.

In the United States District Court for the Northern District of California, Southern Division

Petition No. 130662

In the Matter of the Petition for Naturalization  
of BIENVENIDO VICTORIO SISON

### NOTICE OF APPEAL

Notice is hereby given that the United States does hereby appeal to the Court of Appeals for the Ninth Circuit from the memorandum and order of this Court of June 30, 1958, granting the petition of Bienvenido Victorio Sison for naturalization and the order of this Court of July 15, 1958, admitting said Bienvenido Victorio Sison to citizenship.

Dated August 27, 1958.

ROBERT H. SCHNACKE,  
United States Attorney

/s/ By CHARLES ELMER COLLETT,  
Assistant U. S. Attorney

[Endorsed]: Filed August 27, 1958.

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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are

the full and complete originals and photostats of originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorneys for the appellant:

Petition.

Findings of Fact, Conclusions of Law and Recommendations of the Designated Naturalization Examiner.

Order of Continuation.

Memorandum and Order of Admittance.

Notice of Appeal.

Designation of Record.

Transcript of Preliminary Hearing before the Designated Naturalization Examiner.

Transcript of Proceedings before Judge Oliver J. Carter.

Respondents' Exhibits No. 1 and 2.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 26th day of September, 1958.

[Seal]

C. W. CALBREATH,  
Clerk

/s/ By ETTA G. STEPHENSON,  
Deputy Clerk

In the United States District Court for the Northern District of California, Southern Division

Petition No. 130,662

Petition for Naturalization of BIENVENIDO  
VICTORIO SISON

HEARING ON PETITION FOR  
NATURALIZATION

March 19, 1958

Before: Hon. Oliver J. Carter, Judge.

Appearances: For the Government: Daniel H. Lyons, Designated Naturalization Examiner. For the Petitioner: Norman Stiller.

The Clerk: Bienvenido Victorio Sison, Petition for Naturalization.

Mr. Lyons: Your Honor, I think this is just probably the weakest case of all.

The Court: You mean from the applicant's point of view?

Mr. Lyons: Yes, sir, because the applicant has never been in the United States until last year, and the Government can't see that he is eligible under any provision of the law.

He served in the armed forces of the United States from 1941 to 1945 when he was honorably discharged. His first and only admission to the United States was on July 1, 1956, when he was admitted as a temporary visitor for medical treatment.



The position of the Government, in brief, is that he does not meet the eligibility requirements under the Immigration and Nationality Act of 1952. And while he may have had a status for eligibility for naturalization under Section 702 of the Nationality Act of 1940, this section expired under its own terms on July 31, 1946, and hence cut off any right in process of acquisition; and thirdly, that he had no status which could have been preserved to him under Section 324 of the 1940 Act, because that section provides for judicial naturalization, and the petitioner, never having been out of the Philippines, was never within the jurisdiction of the naturalization court.

Now, if I may file the exhibits in the case——

The Court: You may.

Mr. Lyons: Form 400, Statement of Facts for Separation of Petition of Naturalization and Application to File Petition for Naturalization.

Mr. Stiller: Excepted to.

The Court: Exhibit 1.

(Form 400 referred to was marked Government's Exhibit 1.)

Mr. Lyons: Exhibit 2 is a certification of military-naval service from the Adjutant General, showing the petitioner entered the United States armed forces at Fort Mills in the Philippines on July 18, 1941, and served in an active-duty status from July 18, 1941, to August 22, 1945. He was honorably separated from the service on August 22, 1945.

Mr. Stiller: No objection.

The Court: Exhibit 2.

(Certificate of military service was received in evidence as Government's Exhibit 2.)

Mr. Lyons: And No. 3 is the Designated Examiner's Hearing of September 16, 1956.

Mr. Stiller: No objection.

(Designated Examiner's Hearing of 9/16/56 was received in evidence as Government's Exhibit 3.)

Mr. Stiller: I have given a copy of the brief to Mr. Lyons.

The Court: Do you have any record to make in addition to that which the Government makes?

Mr. Stiller: No, I have no record. The facts are very simple in this case.

The Court: All right, then will you proceed to make your argument?

Mr. Stiller: I will cite the argument I was given a little while ago.

The reason I cited Section D of 1440 is that I think it was the intent on the part of Congress to preserve certain rights that veterans had who served and were eligible, provided they filed under Section 701 and 702.

This section expressly states that, so far as the section is concerned—I mean by its terms it continued in effect the previous law providing the party had filed a petition under it. Well, unfortunately for Sison, he didn't.

Now, the circumstances in the Philippines are this, Your Honor: As I previously stated and the

Examiner so states in his brief, there are no courts in the Philippines, or there were no courts at that time, who could naturalize a petitioner and make them American citizens. I don't feel in my mind, and I think Your Honor after studying this matter will feel, that Congress really had in mind that there had to be a naturalization court there with jurisdiction so that a person could be eligible for citizenship. I think Congress had in mind the service that was rendered by the petitioner and people in his position.

In this case we don't even have the question of the Commonwealth of the Philippines or any of that. He was actually in the regular Army of the United States. Unfortunately, there was a period when there was a representative from the Service in a certain specified place, and if you weren't there, if you were in another area, that was it. The only possibility that you could ever become a citizen was if you could get to the United States.

Now, the worst part of this is that—Your Honor possibly knows this. It hasn't too much bearing on the case, but, if the United States Consul has to issue a visa to come to the United States, either temporarily as a student or visitor or for permanent residence, if the Consul knows that you are coming to the United States for a purpose such as this and might become naturalized, he wouldn't issue a visa, in all probability. He is not supposed to issue visas for purposes other than for temporary pleasure or if a person has reached his place on the quota.

The Philippine quota is a hundred a year. It's the smallest quota that any country can have and it is over-subscribed for many years—has been, was and still continues to be.

The only way that a man like my client could get here is if he could obtain a visa in some way and get to the United States.

It so happens that Sison himself was under medical care in the Philippines but, as I understand it, there are no veterans' facilities for World War veterans in the Philippines, no hospitalization facilities.

The Court: Can he still draw a pension from the United States?

Mr. Stiller: He can still draw a pension but he can't get medical treatment from a United States hospital, and the only way that he can get medical treatment is by coming to the United States, coming under United States auspices, coming to the United States and being treated in a veterans' hospital and that's what he has been doing. He has been treated at Fort Miley out here. As the record shows, he has a 40% disability incurred during the defense of Corregidor. If anybody deserves any benefit by reason of service and by reason of what happened and by virtue of good character, etc., it is a person in his position.

The Court: Well, Mr. Stiller, that goes without saying for all these cases. These men performed services for the United States and I think the service recognizes that. They approach this matter with extreme reluctance in that respect.



Mr. Stiller: Well, I believe that, too, Your Honor. Sometimes I wish they wouldn't struggle so hard in some of these cases. That's the only thing that bothers me.

I mean, if you can go either way, I don't see why you have to go one way rather than the other, I mean, to put it frankly, and the Examiner made a great pitch about—it isn't his doing. It isn't up to him. It is up to authorities beyond him. Whatever the policy reasons are, I don't know, but it seems to me that in this type of cases they could perhaps take a different point of view, particularly in this case where we have a precedent case like the DeMayo case.

I would like to say this, the reference that the Examiner made to misquotation is correct, but, if the decision is read, the statute is cited and the judge certainly knew what the statute was and knew what he had in mind when DeMayo was admitted. These things can happen. Anybody can make a mistake, but the mistake was not in the reasoning or in the ultimate result. It was through inadvertence through some of the references.

The Court: The thought has occurred to me and I raise it now because I don't know that there is any problem of my qualification to sit in this case, but my brother-in-law was captured on Corregidor and I might have some particular feelings toward people who were in that position. He is still in the Army today, and was a part of the American Army on both Batan and Corregidor. I don't think that disqualifies me, but I mention it because



I have some rather strong attachments to him. Do any of you raise any questions

Mr. Stiller: I certainly wouldn't.

The Court: I don't feel that I do have any, but I mention it because I don't want anybody—He is a member of that outfit that was there and thinks a great deal of it and talks of it to great effect. But I have no personal experience in the matter other than simply talking to him.

Then, if no disqualification is raised, I don't think I would accept a suggestion that I be disqualified, but I mention it in case anybody wants to, so you know what the record is.

Mr. Siller: Sison had over four years in the Army, and he also had more than a year and a month's residence in the United States prior to filing this petition.

The Court: Yes, but he didn't come here until recently.

Mr. Stiller: He came here in July, 1956.

The Court: And his Army service ended—

Mr. Stiller: Ended in 1945.

The Court: So his filing in relation to his Army service is the latest of any of them here. I mean the period of time between his discharge from the Army and his filing for citizenship is the greatest distance in time—there is the greatest amount of time between those two periods in this case.

Mr. Stiller: I wouldn't know that for a fact, but it is probably so.

Mr. Lyons: Tabinga is later.

(Simultaneous colloquy between Court and counsel.)

Mr. Stiller: It is pretty much on the same basis. Either his rights are preserved or, frankly, they aren't. There is one case that says that it was, and I think there are at least two cases, one a circuit court case.

The Court: Those are cited in your brief, are they not?

Mr. Stiller: Yes. I think the Court has in mind my arguments and the cases.

The Court: Well, I certainly will review them very quickly. Now, do you have any response?

Mr. Lyons: I haven't any response, but Mr. Stiller has filed another brief here. I don't want to get trapped into writing briefs all at once. May I have a little more extended time on this one?

The Court: Well, I want to get these all at once, Mr. Lyons.

Mr. Lyons: I want you to get them all at once but the thing is, if you are going to give me the same time, I will be awfully pressed.

The Court: I would like to have these cases all stand submitted at the same time. In other words, aren't your problems substantially the same? Couldn't you file one brief in all of them, or a brief in two of them that would be the same brief?

Mr. Stiller: For Prescott you couldn't.

The Court: All right, Prescott's case is separate.

I have this in mind, while I am trying to do this,

I am going to hold the other case that I had this morning and these two cases and the next two cases all together and try to see what the pattern is, because there is a pattern here, as I see it.

I realize there are variances in these matters, but I am trying to make a determination as to a matter of law and I think I will get a better perspective of the law if I see it in the light of the whole group of cases rather than trying to pick one case and ride it through. I can see what the policy is. It gives you a better variation.

Now, some cases may fall into the category and some may not. I find that in statutory interpretation, if you get a broad look at it, you have a much better look at it than you do if you look at it in one perspective.

That doesn't mean that I am not going to consider each individual case, but I think the whole group of cases makes a broader pattern.

Mr. Lyons: They are variations of the same theme; there is no question about that, but I hope I don't have to write three different briefs.

Mr. Stiller: Your Honor, in the third page of my brief, in the first paragraph where I end with, "armed forces," I want to make sure it should state, "and more than one year's residence in the United States prior to filing his petition."

The Court: Are you talking about the Sison case?

Mr. Stiller: Yes. At the top of page 3.

The Court: Oh, yes, I see it. All right, I see it. All right, April 4th for submission. Fifteen days to file briefs.

[Endorsed]: No. 16195. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Bienvenido Victorio Sison, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed and Docketed: September 26, 1958.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

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In the United States Court of Appeals  
for the Ninth Circuit

No. 16195

UNITED STATES OF AMERICA,  
Appellant,  
vs.

BIENVENIDO VICTORIO SISON,  
Appellee.

STATEMENT OF POINTS AND DESIGNA-  
TION OF THE RECORD

The appellant makes the following statement of points on appeal:

1. That the Court erred in not sustaining the motion made by the United States of America to deny the Petition for Naturalization because the

petitioner failed to establish eligibility under the Immigration and Nationality Act of 1952.

2. That the Court erred in ruling that the petitioner acquired a "status" under the Nationality Act of 1940 which was preserved under Section 405 of the Immigration and Nationality Act of 1952.

3. That the Court erred in granting the Petition for Naturalization in that the petitioner failed to establish eligibility under any applicable naturalization statute.

The entire record with the exception of the exhibits, the copy of the Memorandum Opinion and appendix attached to the Examiner's Findings, is designated to be printed.

Dated: October 14, 1958.

ROBERT H. SCHNACKE,  
United States Attorney

/s/ By CHARLES ELMER COLLETT,  
Assistant United States Attorney,  
Attorneys for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 14, 1958. Paul P. O'Brien, Clerk.



No. 16,195  
United States Court of Appeals  
For the Ninth Circuit

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UNITED STATES OF AMERICA,	}	<i>Appellant,</i>
vs.		
BIENVENIDO VICTORIO SISON,		

On Appeal from the United States District Court for the  
Northern District of California.

BRIEF OF APPELLANT.

---

ROBERT H. SCHNACKE,  
United States Attorney,  
CHARLES ELMER COLLETT,  
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Seventh and Mission Streets,  
San Francisco 1, California,  
*Attorneys for Appellant.*

FILED

MAR 18 1959

PAUL F. QUINN, CLERK



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No. 16,195

**United States Court of Appeals  
For the Ninth Circuit**

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UNITED STATES OF AMERICA,  
*Appellant,*

vs.

BIENVENIDO VICTORIO SISON,  
*Appellee.*

On Appeal from the United States District Court for the  
Northern District of California.

**BRIEF OF APPELLANT.**

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**JURISDICTIONAL STATEMENT.**

The appellee, Bienvenido Victorio Sison, filed a petition for naturalization in the United States District Court for the Northern District of California, Southern Division, on July 10, 1957, under the provisions of Section 324(a) of the Nationality Act of 1940 and Section 405(a) of the Immigration and Nationality Act of 1952.

The petition was granted by order of the District Court dated June 30, 1958. A notice of appeal from said order was filed August 27, 1958.

The jurisdiction of the District Court to entertain the petition for naturalization is conferred by Section

310(a) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1421). The jurisdiction of the Court of Appeals for the Ninth Circuit to review the final order of the District Court is conferred by 28 United States Code 1291. Pursuant to the order of June 30, 1958, granting the petition for naturalization, the appellee took the oath of allegiance on July 15, 1958.

An order granting or denying a petition for naturalization is a final decision within the meaning of Judicial Code Section 128 (28 U.S.C. 1291).

*Tutun v. United States*, 270 U.S. 568, 46 S. Ct. 425, 70 L. Ed. 738.

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### STATEMENT OF FACTS.

The appellee was born on December 23, 1921, at Agoon, LaUnion Province, Republic of Philippines. He is married and has four children. His wife and children reside in the Philippines. He was admitted to the United States for the first and only time on July 1, 1956, as a temporary visitor, for medical treatment.

He entered the Philippine Scouts at Fort Mills in the Philippines on July 18, 1941 and served honorably therein in an active duty status from July 18, 1941 to August 22, 1945, at which time his service was terminated by an honorable discharge.

No petition or application for naturalization was filed by appellee, either in the Philippine Islands or in the United States, prior to July 10, 1957, the date of the filing of the petition the granting of which is

the subject of this appeal. The appellee has never been lawfully admitted to the United States for permanent residence.

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### **STATUTES.**

The pertinent statutes are set forth in Appendix I. They are here listed, as follows:

Act of August 16, 1940 (54 Stat. 788), Section 2;

Act of October 14, 1940 (the Nationality Act of 1940), Section 324 (formerly 8 U.S.C. 724); Sections 701 and 702 (formerly 8 U.S.C. 1001 and 1002);

Section 324A (added by Act of June 3, 1948, 62 Stat. 282, and amended by the Act of June 29, 1949 (63 Stat. 202) (formerly 8 U.S.C. 724a);

Section 405a, Immigration and Nationality Act of 1952 (66 Stat. 163) (8 U.S.C.A. 1503a).

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### **STATEMENT OF POINTS RELIED UPON ON APPEAL.**

The appellant has stated the following points on appeal:

1. That the Court erred in not sustaining the motion made by the United States of America to deny the petition for naturalization because the petitioner failed to establish eligibility under the Immigration and Nationality Act of 1952.

2. That the Court erred in ruling that the petitioner acquired a "status" under the Nationality Act

of 1940 which was preserved under Section 405 of the Immigration and Nationality Act of 1952.

3. That the Court erred in granting the petition for naturalization in that the petitioner failed to establish eligibility under any applicable naturalization statute.

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### QUESTION PRESENTED.

The question presented by the statement of points is: Did the appellee have a "status" on December 24, 1952 which was "saved" to him by Section 405(a) of the 1952 Act?

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### SUMMARY OF THE ARGUMENT.

I. *Appellee is not eligible for naturalization under the provisions of the Immigration and Nationality Act of 1952.*

A. Sections 316, 318, and 328 of the 1952 Act (8 U.S.C. 1427, 1429, and 1439) require that the alien must have been lawfully admitted to the United States for permanent residence. Appellee has not been lawfully admitted for permanent residence.

B. Section 328(a) of the 1952 Act (8 U.S.C. 1439(a)) requires that the petition be filed while the petitioner is still in the service, or within six months after discharge. The petition herein was not so filed.



C. Section 328(d) of the 1952 Act (8 U.S.C. 1439(d)) provides that when the petition is filed later than six months after the termination of the "service," Section 316(a) must be complied with. Under the exception in Section 328(d), "Service within five years immediately preceding the filing of such petition shall be considered as residence and physical presence within the United States." Appellee performed no "service" within the five years immediately preceding the filing of the petition. The "service" had terminated in 1945, some twelve years prior to the filing of the petition in 1957.

D. Appellee does not meet the requirements of Section 329 of the 1952 Act (8 U.S.C. 1440), in that at the time of enlistment or induction he was not in the United States, the Canal Zone, American Samoa, or Swain's Island, as required by said section.

*II. In 1952, and particularly on December 24, 1952, appellee was not eligible to be naturalized under any provisions of the Nationality Act of 1940.*

Two sections of the 1940 Act are apposite: Section 324, as amended, and Section 701, as amended. Section 324 was enacted prior to World War II, and required that the petition be filed while the petitioner was in the service or within six months thereafter.

Sections 701 and 702 were added after the outbreak of World War II. Congress liberalized the provisions by eliminating many requirements. Section 702 per-

mitted natuarilization *outside* the United States by a representative of the Immigration and Naturalization Service.

Sections 701 and 702 expired on December 31, 1946. Section 701 was superseded by Section 324A in 1948 (62 Stat. 281), formerly 8 U.S.C. 724a. Section 324A specifically excluded aliens who enlisted or were inducted in the Philippine Islands.

Section 324 was carried forward in substance by Section 328 of the 1952 Act (8 U.S.C. 1439). Appellee did not file his petition while in the service or within six months after discharge. Appellee had no residence of any kind in the United States prior to his admittance as a temporary visitor on July 1, 1956, over ten years subsequent to the termination of his service.

III. *Appellee had no "status" or "right in the process of acquisition" which could have been preserved by Section 405(a), the "savings clause," of the 1952 Act.*

Appellee did have a "status" under Section 701 prior to December 31, 1946, and could have been naturalized outside the United States under Section 702. This status expired on December 31, 1946, and appellee was thereafter subject to Section 324A, which expressly excluded him as an alien enlisted or inducted in the Philippines.

Section 2 of the Act of August 16, 1940 embraced the Naturalization Act of 1906 (34 Stat. 596), as amended, as the act which contained the then existing "naturalization laws." The Naturalization Act of 1906 was repealed by the Nationality Act of 1940, so that

appellee's status was thereafter to be determined by the provisions of the Nationality Act of 1940.

Section 324(d) of the 1940 Act permitted an applicant who filed a petition later than six months after the termination of "service" to credit "service" performed within five years immediately preceding the filing of the petition in satisfaction of the continuous residence requirement. Appellee's "service" ended August 22, 1945, when he was honorably discharged. A petition filed at any time prior to August 22, 1950 could have utilized such portion of his "service" remaining within the five years immediately preceding the filing of the petition as residence. Subsequent to August 22, 1950, no "status" remained to appellee which could have been saved by Section 405 of the 1952 Act.

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### ARGUMENT.

The "status" of appellee must be considered under three Nationality Acts: (1) The Immigration and Nationality Act of 1952 (8 U.S.C. 1101 et seq.); (2) the Nationality Act of 1940, Act of October 14, 1940 (54 Stat. 1137); (3) the Act of June 29, 1906 (34 Stat. 596). The Court must determine *first*, whether appellee is eligible for naturalization under existing naturalization laws, the Immigration and Nationality Act of 1952; and second, whether appellee had a "status" on December 24, 1952 which was "saved" to him by Section 405(a), the "savings clause" of the 1952 Act.

I. APPELLEE DOES NOT MEET THE ELIGIBILITY REQUIREMENTS OF THE IMMIGRATION AND NATIONALITY ACT OF 1952.

Sections 328, 316, and 318 of the 1952 Act (8 U.S.C. 1439, 1427, and 1429) require lawful admission for permanent residence; also, if the termination of the military service has been more than six months preceding the filing of the petition, only such service as was performed within five years immediately preceding the filing of the petition may be considered as residence.

*Aure v. United States* (9 Cir.), 225 F. 2d 88.

Appellee has not been admitted for permanent residence, and his military service occurred almost twelve years prior to the filing of the petition. Section 329 of the 1952 Act (8 U.S.C. 1440) requires that a petitioner must have been in the United States, the Canal Zone, American Samoa, or Swain's Island at the time of enlistment or induction, or have been lawfully admitted for permanent residence subsequent to enlistment or induction. Appellee cannot satisfy either of these requirements.

No claim has been made that appellee is eligible under the 1952 Act. Appellant does not believe that such a claim can be made.

Appellee is not eligible under the Act of June 30, 1953 (67 Stat. 108, 8 U.S.C. 1440(a)), which covers service *after* June 24, 1950.

**II. APPELLEE DID NOT HAVE A "STATUS" WHICH WAS "SAVED" TO HIM BY THE "SAVINGS CLAUSE" OF THE 1952 ACT.**

The asserted facts are:

(1) Appellee served in the Philippine Scouts from July 18, 1941 to August 22, 1945, when he was honorably discharged.

(2) He was first admitted to the United States on July 1, 1956, as a *temporary* visitor.

(3) The first and only petition for naturalization was filed on July 10, 1957.

Two sections of the 1940 Act are apposite, Section 324, as amended, and Section 701, as amended. Section 324 (8 U.S.C.A. former Section 724), essentially a peacetime provision, was enacted prior to the outbreak of World War II. Section 701 was enacted after the outbreak of World War II.

**A. Appellee had no status under Sections 701-702.**

Sections 701 and 702 were added to the Nationality Act of 1940 by the Act of March 27, 1942 (56 Stat. 182, 8 U.S.C.A. former sections 1001-1002), providing for a more expeditious method of naturalization for members of the armed forces by eliminating the usual requirements relating to residence, lawful admission, etc. Section 702 provided for naturalization outside the United States by a representative of the Immigration and Naturalization Service.

Section 701 expired by its own terms on December 31, 1946, and was superseded by Section 324A, added by the Act of June 1, 1948 (62 Stat. 281, 8 U.S.C.A.



former Section 724(a)). Section 2 of the 1948 Act provided that the eligibility of any person who filed a petition for naturalization prior to January 1, 1947, under said Section 701 "which is still pending on the date of approval of this Act, shall be determined in accordance with Section 324A of the Nationality Act of 1940, as added by Section 1 of this Act."

Section 324A carried forward many of the liberal provisions of former Section 701, but specifically excluded aliens who were enlisted or inducted in the Philippines.

Thus appellee could not have been naturalized under Section 701, even though he had filed a petition prior to December 31, 1946, if said petition was still pending on December 31, 1946.

Appellee, therefore, had no status under either Section 701 or 324A which could have been saved to him by Section 405(a) of the 1952 Act.

**B. Appellee had no status under Section 324.**

Appellee had the requisite three years' honorable service in the Army required by 324(a) and would have been entitled to the exemptions specified in Section 324(b) had he filed a petition while still in the service or within six months after the termination thereof. However, naturalization under this section was judicial, and unlike 702, could only take place in courts exercising naturalization jurisdiction. Physical presence in the United States, whether pursuant to a legal admission or not, was essential.

Under Section 324(c), a petitioner who filed under 324(a) but whose service was not continuous, was required to meet the following condition:

“Petitioner’s residence in the United States and State, . . . during any period within five years immediately preceding the date of filing of said petition between the periods of petitioner’s service . . ., shall be verified in the petition filed under the provisions of subsection (a), etc.”

Three years’ service brought such a petitioner within 324(a) but because it was not continuous he had to fill the gaps during five years immediately preceding the filing of the petition with proof of residence in the United States.

Appellee is not concerned with 324(c), as he did not file while in the service or within six months thereafter.

Section 324(d) permitting the filing of a petition beyond the six months after termination of such service, but required compliance with Section 309 of the 1940 Act (8 U.S.C. 709). Section 324(d) provided as follows:

(d) The petitioner shall comply with the requirements of section 309 as to continuous residence in the United States for at least five years and in the State in which the petition is filed for at least six months, immediately preceding the date of filing the petition, if the termination of such service has been more than six months preceding the date of filing the petition for naturalization, except that such service shall be considered as residence within the United States or the State.

Section 309 required satisfying the residence and other qualifications of Section 307 (8 U.S.C. 707). Under Section 324(d), it would have been necessary for appellee to have established five years' residence prior to the filing of the petition.

Moreover, Section 307(b) provided that

“absence from the United States for a continuous period of one year or more during the period for which continuous residence is required for admission to citizenship, immediately preceding the date of filing the petition for naturalization or during the period between the date of filing the petition and the date of final hearing, shall break the continuity of such residence . . .”

The exception contained in Section 324(d) permitted service performed within the five years immediately preceding the date of filing the petition to be counted toward the requisite residence.

To recapitulate: Under 324(a), the petitioner who filed while in the service or within six months thereafter was not required to have continuous residence immediately preceding the date of filing of the petition, in the United States for at least five years and in the State for at least six months.

Under 324(c), if service was not continuous, then petitioner had to meet the residence requirement by filling in the gaps in his service within the five years immediately preceding the filing.

Under 324(d), if the petition was not filed within the six months after service, then petitioner had to satisfy the requirements of Sections 309 and 307 in

proving continuous residence in the United States for at least five years immediately preceding the filing of the petition. Under the exception, military service during the five years could be credited as residence.

The Congressional intent is clearly expressed in Senate Report 1515, Report of the Committee on the Judiciary pursuant to S. Res. 137 (80th Congress, 1st Session, as amended), pp. 703, 704 (Appendix II), where it is stated (Appendix I):

“When the Nationality Act was enacted in 1940, the nature and scope of our possible participation in World War II could not be accurately anticipated and provided for. As a result, the Congress has found it necessary to enact certain amendments liberalizing naturalization privileges to those aliens who served in our armed forces during the war. Some of these provisions have now lapsed, and those aliens now serving in our armed forces do not enjoy the extremely liberal provisions which were enjoyed during the war period.

At the present time Section 324 of the act provides that a person who has served honorably at any time in the Army, Navy, Marine Corps, or Coast Guard for three years and who, if separated from the service, has been honorably discharged, may be naturalized upon petition while in the service or within six months after termination of his service. No declaration of intention, certificate of arrival, or residence within the court's jurisdiction is required, but with these exceptions the other requirements to naturalization, including racial eligibility, must be complied with. If the alien is in the service at the time of naturalization he may be naturalized immediately



by appearing before a representative of the Immigration and Naturalization Service, accompanied by two citizen witnesses. If, however, he files for naturalization more than six months after completion of his honorable service, he must comply with the general residence requirements of the Act—that is, five years continuous residence in the United States and six months in the State—but his service in the armed forces, wherever it has occurred, is to be considered as residence within the United States and the State.

In cases where the military service was not continuous, residence, good moral character, and attachment to the Constitution, for any non-service period for five years preceding the date of filing the petition must be proved as in regular naturalization proceedings.”

Appellee would have been eligible under Section 324 of the 1940 Act had he filed his petition while in the service or within six months after termination thereof. Having filed the petition later, it is incumbent upon him to prove residence in the United States, good moral character, etc., for the five-year period preceding the date he filed his petition, except that military or naval service honorably rendered during that period may be counted as residence.

*Yuen Jung v. Barber* (9 Cir. 1950), 184 F. 2d 491;

*In re Fleischmann* (D.C. N.Y. 1943), 49 F. Supp. 223;

*Petition of Gislason* (D.C. Mass.), 47 F. Supp. 46.



There is no question but that appellee had a "status" for naturalization purposes in 1945-46. He could have filed a petition under Section 701 (8 U.S.C. former 1001) prior to December 31, 1946, and been naturalized outside the United States under Section 702 (8 U.S.C. former 1002). Any such "status" under said section, however, did not survive the lapse of Section 701. Section 324A (*supra*) excluded aliens enlisted or inducted in the Philippines. The rule in *United States v. Menasche* (1955), 348 U.S. 528, 75 S. Ct. 513, and *Aure v. United States* (9 Cir. 1955), 225 F. 2d 88, therefore, is not applicable. Appellant has no "status" to be saved by Section 405 of the 1952 Act.

*De La Cena v. United States* (9 Cir. 1957), 249 F. 2d 341.

The Court below has held that appellee, by virtue of his military service, did acquire a "status" which was preserved by the "savings clause" of the 1952 Act (Section 405, 8 U.S.C.A. 1101, note). In so ruling the Court expressly followed the prior decision of the District Court in *Petition of De Mayo* (D.C. Cal. 1956), 146 F. Supp. 759. In the *De Mayo* opinion, at page 760, the Court first quoted 8 U.S.C. 724(d) (Section 324(d) of the 1940 Act), then continued to say, "This section is supplemented by Section 2 of the Act:" The Section 2 referred to is not a part of the 1940 Act but is Section 2 of the Act of August 16, 1940 (54 Stat. 788, 8 U.S.C.A. former Section 389a), amending the Act of August 19, 1937 (50 Stat. 696). This section is quoted in the opinion as follows:

“Hereafter, service in the Regular Army honorably terminated shall be credited for purposes of legal residence under the naturalization laws of the United States, regardless of the legality or illegality of the original entry into the United States of the alien, the certificate of the honorable termination of such service or a duly authenticated copy thereof made by a naturalization examiner of the Immigration and Naturalization Service being accepted in lieu of the certificate from the Department of Justice of the alien’s arrival in the United States required by the Naturalization laws; and service so credited in each case shall be considered as having been performed immediately preceding the filing of the petition for naturalization.”

The Act of August 16, 1940 was enacted prior to the Nationality Act of 1940 (October 14, 1940). Reference is twice made to “the Naturalization laws.” The naturalization laws then existing were contained in the Nationality Act of 1906, as amended. The 1906 Act was expressly repealed by the Nationality Act of 1940. Although the Act of August 16, 1940 was not expressly repealed until the Immigration and Nationality Act of 1952, its provisions were rendered ineffective by the repeal of the 1906 Act.

The Act of August 16, 1940 (8 U.S.C.A. former Section 389a) was a fragmentary statute which amended the Act of August 19, 1937, which in turn had amended the Act of July 1, 1937 (50 Stat. 446). The Act was essentially concerned with “pay” and “re-enlistment” in the Army.

The legislative history of the Act clearly indicates that it was special legislation, applicable to a specific class of enlisted men whom Congress desired to protect. The House Committee on Military Affairs reported (Appendix III):

“The bill H.R. 9158 extends for a three-year period the time for perfecting citizenship. It does not apply to aliens who were not already in the service on July 1, 1937, and would not permit the original enlistment of any alien.

“The proposed legislation includes proper safeguards. Under its terms no alien who has failed to procure his final citizenship papers may be continued in service after June 30, 1943.

\* \* \*

“The proposed legislation in effect extends to June 30, 1943, the time in which the few remaining alien enlisted men (other than Philippine Scouts) may perfect their citizenship, and credits, for purpose of legal residence under the laws pertaining to naturalization of aliens, the periods of honorably terminated service in the Regular Army.” House Report 2111, 76th Congress, 3rd Session (to accompany H.R. 9158), approved as amended in Senate Report 1939.

Generally, where Congress has sought to codify a particular field, intending to cover the whole subject, all prior laws inconsistent with the code are impliedly repealed. *First National Bank v. Pittsburgh, F.W. and C.T. Ry. Co.* (D.C. Pa. 1939), 31 F. Supp. 381.

Such Congressional intent is manifested in Section 301(d) of the 1940 Act, providing that “a person may

be naturalized in the manner and under the conditions prescribed in this chapter and *not otherwise*." [Emphasis added.]

Furthermore, the previous Nationality Act of 1906 was expressly repealed.

"It is fundamental that a prior statute must yield to a subsequent valid act of Congress, insofar as the statutes are repugnant."

*Marcello v. Ahrens* (5 Cir. 1954), 212 F. 2d 830, aff'd 349 U.S. 302, 75 S. Ct. 757 (1954).

Had appellee filed his petition at any time prior to December 24, 1952, he would have had to prove residence, good moral character, etc., for the portion of the period not covered by "service."

*Yuen Jung v. Barber* (9 Cir. 1950), 184 F. 2d 491;

*In re Fleischmann* (D.C. N.Y. 1943), 49 F. Supp. 223.

On August 22, 1950 he became ineligible under Section 324.

The effect of the District Court's ruling is to give appellee a "status" which he did not have. No "service" credit remained to appellee beyond August 22, 1950—five years from the date of his discharge from the "Scouts." Prior to August 22, 1950 appellee would have had to comply with the requirements of Section 324(d), 309 and 307, which he was unable to do *because he had no residence in the United States*. His only right was to use his military service performed within the required period as a substitute for



residence. This was the only "status" or "right" which appellee had under the 1940 Act. He had no pending declaration of intention or residence to give rise to rights under the 1940 Act as in *Menasche* (supra). No proceeding of any kind had been instituted until 1957. There was no right in existence to be saved by Section 405(a) of the 1952 Act on the effective date of that Act. This Court held in *Aure v. United States* (supra) that "its (Section 405(a) of the 1952 Act) preservation feature should be extended to all substantive rights existing *at the time the statute creating the rights was repealed*." [Emphasis added.] Having no residence in the United States, there was no eligibility or right to be naturalized to be saved by Section 405(a) on December 24, 1952.

*De La Cena v. United States* (supra);

*Applications of Tano, et al.* (D.C. Cal. 1955),  
139 F. Supp. 797, aff'd per curiam (9 Cir.  
1956) 237 F. 2d 916.

In *Petition of Pringle* (D.C. Va. 1953), 122 F. Supp. 90, aff'd per curiam (4 Cir. 1954), 212 F. 2d 878, the petitioner was eligible on the date of repeal of the 1940 Act, and had an application to file a petition (Form N-400) pending. He was prevented from filing his petition only by administrative delay in processing.

In *In re Jocson* (D.C. Haw. 1954), 117 F. Supp. 528, *Jocson*, like *Aure*, was still in the Navy when he filed his petition.

The decision of the District Court would allow a petitioner with no previous residence in the United



States to file a petition immediately upon arrival in the United States as a temporary visitor, precluding the United States from making any inquiry into the petitioner's moral character, attachment to the Constitution, etc., during the past five years. Honorable military service, however remote, would be accepted in lieu of such proof under Section 324(d). We are not dealing with liberal wartime legislation, such as Sections 701, 324A, or 329 of the 1952 Act; Section 324 was essentially a peacetime provision. There is no indication that Congress intended such sweeping effect to Section 324, but rather a manifest desire that it waive only the minimum requirements imposed upon a petitioner. It was obviously designed to reward those aliens with three years' honorable service who acted promptly, while still in the service or within six months after discharge. As to those who waited, the requirement of residence and proof of good moral character, etc., was imposed, to be obviated only during the five years immediately preceding the filing of the petition by "service"—in other words, during a period when such proof is obtainable through military records.

## CONCLUSION.

Appellee had a "status" of eligibility for naturalization under Section 701 of the 1940 Act, but such "status" did not continue beyond December 31, 1946.

Appellee had no residence in the United States during the five years preceding the repeal of the 1940 Act. His military service was performed more than five years prior to said repeal. On December 24, 1952, the effective date of the 1952 Act, appellee had no "status of eligibility" or "right to be naturalized" to be saved by Section 405(a) of said Act. *Aure* and *Pringle* (supra) did have such a status, which continued so long as they were in the service and within six months after discharge. *Menasche* (supra) had, in addition to a pending declaration of intention, some residence which gave rise to "rights in the process of acquisition." His eligibility was contingent upon his completing the required period of residence, which he had begun to do. Had the Nationality Act of 1940 not been repealed, *Menasche* would have been eligible (so far as his residence was concerned) after the passage of time. So also with *Aure* and *Pringle*, so long as they stayed in the service or filed their petitions within six months after discharge. Appellee, who remained in the Philippines for twelve years after his service was terminated, lost whatever rights he had acquired by failing to establish residence in the United States after December 31, 1946. The right to substitute "service" for residence expired August 22, 1950.

It is respectfully submitted that the Court below has erred in holding that appellee had a "status"

which could be saved and in thereupon granting appellee's petition for naturalization.

Dated, March 12, 1959.

ROBERT H. SCHNACKE,

United States Attorney,

CHARLES ELMER COLLETT,

Assistant United States Attorney,

*Attorneys for Appellant.*

(Appendices I, II and III Follow.)

## **Appendices.**





## Appendix I

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### STATUTES.

Section 324 of the Nationality Act of 1940 (8 U.S.C.A., 1946 Ed. 724) provided in pertinent part:

- (a) A person, including a native-born Filipino, who has served honorably at any time in the United States Army, Navy, Marine Corps, or Coast Guard for a period or periods aggregating three years and who, if separated from such service, was separated under honorable conditions, may be naturalized without having resided, continuously immediately preceding the date of filing such person's petition, in the United States for at least five years and in the State in which the petition for naturalization is filed for at least six months, if such petition is filed while the petitioner is still in the service or within six months after the termination of such service.<sup>1</sup>

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<sup>1</sup>Subsection (a) was amended by the Act of July 2, 1946 (60 Stat. 417) which struck out the phrase "including a native-born Filipino" following "a person". The stricken phrase was no longer necessary since the Act of July 2, 1946 made "Filipino persons or person of Filipino descent" racially eligible for citizenship. Former Section 303 of the 1940 Act (8 USC 703, 1946 ed.) contained the proviso that "nothing in this section shall prevent the naturalization of native-born Filipinos having the honorable service in the United States Army, Navy, Marine Corps, or Coast Guard as specified in Section 724 (324), . . ." Prior to July 2, 1946, Filipinos generally were not racially eligible for naturalization (*Toyota v. United States*, 268 U.S. 402 (1925); *De La Yala v. United States*, 77 F. (2) 968 (C.C.A. 9, 1935) cer. den. 296 U.S. 575). The exceptions were Section 324 and Section 701 of the Second War Powers Act amending the 1940 Act (8 USC 1001, 1951 Pocket Part). The latter section applied only to those serving in World War II.

- (b) A person filing a petition under subsection (a) of this section shall comply in all respects with the requirements of this subchapter except that—
- (1) No declaration of intention shall be required;
  - (2) No certificate of arrival shall be required;
  - (3) No residence within the jurisdiction of the court shall be required;
  - (4) Such petitioner may be naturalized immediately if the petitioner be then actually in any of the services prescribed in subsection (a) of this section, and if, before filing the petition for naturalization, such petitioner and at least two verifying witnesses to the petition, who shall be citizens of the United States and who shall identify petitioner as the person who rendered the service upon which the petition is based, have appeared before and been examined by a representative of the Service.
- (c) In case such petitioner's service was not continuous, petitioner's residence in the United States and State, good moral character, attachment to the principles of the constitution of the United States, and favorable disposition toward the good order and happiness of the United States, during any period within five years immediately preceding the date of filing said petition between the period of petitioner's service in the United States Army, Navy, Marine Corps, or Coast Guard, shall be verified in the petition filed under the provisions of subsection (a) of this section, and proved at the final hearing thereon by witnesses, citizens of the United States, in the same manner as required by Section 309. Such verification and proof shall also be made as to any period between

the termination of petitioner's service and the filing of the petition for naturalization.

- (d) The petitioner shall comply with the requirement of Section 309 as to continuous residence in the United States for at least five years and in the State in which the petition is filed for at least six months, immediately preceding the date of filing the petition, if the termination of such service has been more than six months preceding the date of filing the petition for naturalization, except that such service shall be considered as residence within the United States or the State.
- (e) Any such period or periods of service under honorable conditions, and good moral character, attachment to the principles of the Constitution of the United States, and favorable disposition toward the good order and happiness of the United States, during such service, shall be proved by duly authenticated copies of records of the executive departments having custody of the records of such service, and such authenticated copies of the records shall be accepted in lieu of affidavits and testimony or depositions of witnesses."

Section 701 of the Nationality Act of 1940, as amended by the Act of December 22, 1944 (58 Stat. 886, 8 U.S.C. Supp. V, Sec. 1001) provided:<sup>2</sup>

"Notwithstanding the provisions of Sections 303 and 326 of this Act, any person not a citizen, regardless of age, who has served or hereafter serves honorably in the military or naval forces of the United States during the present war and who shall have been at the time of his enlistment

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<sup>2</sup>Section 701, as amended, was repealed by section 403 (a) (42) of the present Act.

or induction a resident thereof and who (a) was lawfully admitted into the United States, including its territories and possessions, or (b) having entered the United States, including its territories and possessions, prior to September 1, 1943, being unable to establish lawful admission into the United States serves honorably in such forces beyond the continental limits of the United States or has so served may be naturalized upon compliance with all the requirements of the naturalization laws except that (1) no declaration of intention, no certificate of arrival for those described in group (b) hereof, and no period of residence within the United States or any State shall be required; (2) the petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner; (3) the petitioner shall not be required to speak the English language, sign his petition in his own handwriting, or meet any educational tests; and (4) no fee shall be charged or collected for making, filing, or docketing the petition for naturalization, or for the final hearing thereon, or for the certification of naturalization, if issued: Provided, however, that (1) there shall be included in the petition the affidavits of at least two credible witnesses, citizens of the United States, stating that each such witness personally knows the petitioner to be a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States, (2) the service of the petitioner in the military or naval forces of the United States shall be proved by affidavits, forming part of the petition, of at least two citizens of the United



States, members or former members during the present war of the military or naval forces of the non-commissioned or warrant officer grade or higher (who may be the witnesses described in clause (1) of this proviso), or by a duly authenticated copy of the record of the executive department having custody of the record of petitioner's service, showing that the petitioner is or was during the present war a member serving honorably in such armed forces, and (3) the petition shall be filed not later than December 31, 1946. The petitioner may be naturalized immediately if prior to the filing of the petition the petitioner and the witnesses required by the foregoing proviso shall have appeared before and been examined by a representative of the Immigration and Naturalization Service . . .”<sup>3</sup>

Section 702 of the Nationality Act of 1940 (added March 27, 1942, 56 Stat. 182, 187, 8 U.S.C. Supp. V. Sec. 1002) as amended by the Act of December 22, 1944 (58 Stat. 887) provided, in pertinent part:

“During the present war any person entitled to naturalization under Section 701 of this Act, who

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<sup>3</sup>The Act of December 22, 1944 amended the original Act (56 Stat. 182, March 27, 1942) by striking out “who, having been lawfully admitted to the United States, including its Territories and possessions, shall have been at the time of his enlistment or induction a resident thereof” and inserting in lieu thereof the following: “who shall have been at the time of his enlistment or induction a resident thereof and who (a) was lawfully admitted into the United States, including its Territories and possessions, or (b) having entered the United States, including the Territories and possessions prior to September 1, 1943, being unable to establish lawful admission into the United States serves honorably in such forces beyond the continental limits of the United States or has so served”. The Act also amended the original statute by inserting after the words “no declaration of intention” the following: “no certificate of arrival for those described in group (b) hereof”.



while serving honorably in the military or naval forces of the United States is not within the jurisdiction of any court authorized to naturalize aliens, may be naturalized in accordance with all the applicable provisions of Section 701 without appearing before a naturalization court. The petition for naturalization of any petitioner under this section shall be made and sworn to before, and filed with, a representative of the Immigration and Naturalization Service designated by the Commissioner or a Deputy Commissioner, which designated representative is hereby authorized to receive such petition in behalf of the Service, to conduct hearings thereon, to take testimony concerning any matter touching or in any way affecting the admissibility of any such petitioner for naturalization, to call witnesses, to administer oaths including the oath of the petitioner and his witnesses to the petition for naturalization and the oath of renunciation and allegiance prescribed by Section 335 of this Act, and to grant naturalization, and to issue certificates of citizenship: *Provided*, that the record of any proceedings hereunder, together with a copy of the certificate of citizenship shall be forwarded to and filed by the clerk of a naturalization court in the district designated by the petitioner and be made a part of the record of the court . . .”<sup>4</sup>

Section 324A of the 1940 Act (8 U.S.C. 724a prior to 1952) (added by Act of June 1, 1948, 62 Stat. 282, as amended by the Act of June 29, 1949 (63 Stat. 202)), provided in pertinent part:

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<sup>4</sup>The 1944 amendment inserted “designated by the petitioner” in lieu of “in which the petitioner is a resident” in the proviso.

“(a) Any person not a citizen who has served honorably in an active-duty status in the military or naval forces of the United States during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946, or who, if separated from such service was separated under honorable conditions, may be naturalized as provided in this section if (1) at the time of enlistment or induction such person shall have been in the United States or an outlying possession (including the Panama Canal Zone, but excluding the Philippine Islands), or (2) at any time subsequent to enlistment or induction such person shall have been lawfully admitted to the United States for permanent residence. The executive department under which such person served shall determine whether persons have served honorably in an active-duty status, and whether separation from such service was under honorable conditions: *Provided*, however, that no person who is or has been separated from such service on account of alienage, or who was a conscientious objector who performed no military or naval duty whatever or refused to wear the uniform, shall be regarded as having served honorably or having been separated under honorable conditions for the purpose of this section.

“(b) A person filing a petition under subsection (a) of this section shall comply in all respects with the requirements of this chapter except that—

“(1) he may be naturalized regardless of age, and notwithstanding the provisions of sections 303 and 326 of this Act;

“(2) no declaration of intention, no certificate of arrival, and no period of residence within the United States or any State shall be required;

“(3) the petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner;

“(4) there shall be included in the petition the affidavits of at least two credible witnesses, citizens of the United States, stating that each such witness personally knows the petitioner to be a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States;

“(5) when serving in the military or naval forces of the United States, the service of the petitioner shall be proved either (1) by affidavits forming part of the petition, of at least two citizens of the United States, members of the military or naval forces of a non-commissioned or warrant officer grade, or higher (who may be the same witnesses described in clause (4) of this subsection), or (2) by a duly authenticated certification from the executive department under which the petitioner is serving. Such affidavits or certifications shall state whether the petitioner has served honorably in an active-duty status during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946;

“(6) if no longer serving in the military or naval forces of the United States, the service of the petitioner shall be proved by a duly authenticated certification from the executive department under which the petitioner served, which

shall state whether the petitioner served honorably in an active-duty status during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946, and was separated from such service under honorable conditions; and

“(7) notwithstanding section 334c of this title, the petitioner may be naturalized immediately if prior to filing of the petition the petitioner and the required witnesses shall have appeared before and been examined by a representative of the Service.

\* \* \*

“Sec. 2. The eligibility for naturalization of any person who filed a petition for naturalization prior to January 1, 1947, under Section 701 of the Nationality Act of 1940, as amended (8 U.S.C. Supp. V. Sec. 1001) and which is still pending on the date of approval of this Act, shall be determined in accordance with section 324A of the Nationality Act of 1940, as added by section 1 of this Act.”<sup>5</sup>

(Sec. 2 of the Act of August 16, 1940 (54 Stat. 788))

Hereafter, service in the Regular Army honorably terminated shall be credited for purposes of legal residence under the naturalization laws of the United States, regardless of the legality or illegality of the original entry into the United

<sup>5</sup>Section 329(d) of the 1952 Act (8 U.S.C. 1440) provides that “the eligibility for naturalization of any person who filed a petition for naturalization prior to January 1, 1947, under Section 701 of the Nationality Act of 1940, as amended . . . and which is still pending on the effective date of this Chapter, shall be determined in accordance with the provisions of this section”.

States of the alien, the certificate of the honorable termination of such service or a duly authenticated copy thereof made by a naturalization examiner of the Immigration and Naturalization Service being accepted in lieu of the certificate from the Department of Justice of the alien's arrival in the United States required by the naturalization laws; and service so credited in each case shall be considered as having been performed immediately preceding the filing of the petition for naturalization.



## Appendix II

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Report of the Committee on the Judiciary pursuant to S. Res. 137, 80th Congress, 1st Session, as amended. A resolution to make an investigation of the Immigration System. (S. Rep. 1515, 81st Congress, 2nd Session, pages 703-704).

### 2. ARMED SERVICES PERSONNEL

When the Nationality Act was enacted in 1940, the nature and scope of our possible participation in World War II could not be accurately anticipated and provided for. As a result, the Congress has found it necessary to enact certain amendments liberalizing naturalization privileges to those aliens who served in our armed forces during the war. Some of these provisions have now lapsed, and those aliens now serving in our armed forces do not enjoy the extremely liberal provisions which were enjoyed during the war period.

At the present time section 324 of the act provides that a person who has served honorably at any time in the Army, Navy, Marine Corps, or Coast Guard for 3 years and who, if separated from the service, has been honorably discharged, may be naturalized upon petition while in the service or within 6 months after termination of his service. No declaration of intention, certificate of arrival, or residence within the court's jurisdiction is required, but with these exceptions the other requirements to naturalization, including racial eligibility, must be complied with. If the alien is in the service at the time of naturalization he may be naturalized immediately by ap-

pearing before a representative of the Immigration and Naturalization Service, accompanied by two citizen witnesses. If however, he files for naturalization more than 6 months after completion of his honorable service, he must comply with the general residence requirements of the act—that is, 5 years' continuous residence in the United States and 6 months in the State—but his service in the armed forces, wherever it has occurred, is to be considered as residence within the United States and the State.

In cases where the military service was not continuous, residence, good moral character, and attachment to the Constitution, for any nonservice period for 5 years preceding the date of filing petition must be proved as in regular naturalization proceedings.

The wartime provisions granting special privileges for wartime service have lapsed, but a new section, section 324A, was added to the Nationality Act on June 1, 1948. This new section provides for naturalization of an alien who has served honorably in an active-duty status during World War I or World War II. Racial barriers to naturalization, as well as the status of being an alien enemy, do not apply to persons earning citizenship through such active-duty service. Likewise waived are the requirements for declaration of intention, certificate of arrival, and residence requirements within the United States and State. The applicant, however, must file a petition for naturalization and must include the affidavits of two credible citizen witnesses, attesting to his good moral character and attachment to the Constitution. If he has completed his honor-

able military or naval service, the same must be proved by proper departmental certification. Subsequent dishonorable discharge is ground for revocation of naturalization. It should be noted that wartime service must be in an active-duty capacity but that no particular or specific period of time is necessary. There are two provisions not included in the Nationality Act which relate to service in our armed forces by aliens. One is contained in the Selective Service Act of 1948,<sup>1</sup> section 4 (a) of which forever bars from naturalization any alien who, not being deferrable or exempt from training and service, applies for relief from such training and service prior to his induction. The other provision is contained in the Act of August 1, 1894,<sup>2</sup> which provides that—

in time of peace no person \* \* \* who is not a citizen of the United States, or who has not made legal declaration of his intention to become a citizen of the United States, \* \* \* shall be enlisted for the first enlistment in the Army.

Various proposals have been made, and in the last session of the Congress the Senate passed S. 2269, to enlist foreigners in our armed services for service overseas and to grant them special citizenship privileges.<sup>3</sup>

(Sec. 405(a) of the 1952 Act (8 U.S.C. 1503(a))

Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of

<sup>1</sup>62 Stat. 604; 50 U.S.C. App. 454(a).

<sup>2</sup>28 Stat. 216.

<sup>3</sup>S. 2269, 81st Cong.

naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in full force and effect. When an immigrant in possession of an unexpired immigrant visa issued prior to the effective date of this Act, makes application for admission, his admissibility shall be determined under the provisions of law in effect on the date of the issuance of such visa. An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended, or for adjustment of status under section 4 of the Displaced Persons Act of 1948, as amended, which is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection.



### Appendix III

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House Report 2111, 76th Congress, 3rd Session (to accompany H.R. 9158) approved as amended in Senate Report 1939, 76th Congress, 3rd Session.

“The Committee on Military affairs to whom was referred the bill (H.R. 9158) to amend the act entitled ‘An act for the protection of certain enlisted men of the Army’, approved August 19, 1937, and for other purposes, having considered the same, submit the following report thereon, with the recommendation that it do pass.

\* \* \*

“Recognizing the desirability of restricting the enlistment of aliens in the Army, Congress included in the language of the Military Appropriations Act, fiscal year 1938, approved July 1, 1937, a provision prohibiting (with certain exceptions) payment of personnel who are not citizens of the United States. Because the language of this Act would have forced many men of long service out of the Army, and because it appeared proper to grant sufficient time to deserving men to perfect their citizenship status, Congress passed legislation approved August 19, 1937, which permitted reenlistment for the 3-year period ending August 19, 1940, of alien enlisted men who have legally declared their intention to become citizens or who do so during current enlistment or who have been discharged since July 1, 1937, and who also agree to complete expeditiously their naturalization and become citizens of the United States.

“The period during which citizenship status may be perfected is rapidly drawing to an end,



and it is estimated by the War Department that approximately 200 men, nearly all of long service, including some who are veterans of the World War, will have to be discharged because of inability to complete their naturalization. Some of these men have been on foreign service in the Philippines or Panama, where no courts of jurisdiction are available; others have been unable to secure their citizenship because of irregularities in their entrance into the United States or because records have been lost.

“Your committee believes that men who have served this country long and faithfully should be afforded this opportunity to become citizens and continue in service. The bill H.R. 9158 extends for a 3-year period the time for perfecting citizenship. It does not apply to aliens who were not already in the service on July 1, 1937, and would not permit the original enlistment of any alien.

“The proposed legislation includes proper safeguards. Under its terms no alien who has failed to procure his final citizenship papers may be continued in service after June 30, 1943.”

No. 16,195

United States Court of Appeals  
For the Ninth Circuit

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UNITED STATES OF AMERICA,	}
vs.	
BIENVENIDO VICTORIO SISON,	
	<i>Appellant,</i>
	<i>Appellee.</i>

On Appeal from the United States District Court  
for the Northern District of California.

BRIEF FOR APPELLEE.

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FILED

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UNITED STATES OF AMERICA,	}
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VS.

BIENVENIDO VICTORIO SISON,	}
<i>Appellee.</i>	

On Appeal from the United States District Court  
for the Northern District of California.

**BRIEF FOR APPELLEE.**

---

**JURISDICTIONAL STATEMENT.**

This appeal is from a judgment and order (T. 26-27) of the United States District Court granting appellee's petition for naturalization in the exercise of the jurisdiction conferred upon it by Section 310(a) of the Immigration and Nationality Act (8 U.S.C. Section 1421).

Jurisdiction to review the judgment of the court below is conferred upon this Court by 28 U.S.C. Section 1291.

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**STATEMENT OF THE CASE.**

The facts are not in dispute. Appellee, a citizen of the Republic of the Philippines, served in the United

States Army (Philippine Scouts) from July 18, 1941 to August 22, 1945, and was honorably discharged for disability from wounds received in action (T. 11). Appellee receives disability compensation from the Veterans Administration (T. 11) and on July 1, 1956 came to the United States for medical treatment. He filed his petition for naturalization on July 10, 1957 (T. 8).

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### **THE QUESTION PRESENTED.**

The question involved can be very simply stated, viz.:

Does the savings clause of Section 405(a) of the Immigration and Nationality Act of 1952 (8 U.S.C.A. Section 1101 Note) preserve the rights which had accrued to appellee under Section 2 of the Act of August 16, 1940 (54 Stat. 788) and Section 324 of the Nationality Act of 1940 (54 Stat. 1149, 8 U.S.C. former Section 724) by reason of his Army service?

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### **ARGUMENT.**

#### **1. APPELLEE'S RIGHTS UNDER THE 1940 STATUTES.**

At the outset it is necessary to consider just what rights were conferred upon appellee by reason of his Army service, under the two above cited statutes which were in effect prior to the Immigration and Nationality Act of 1952.

Section 2 of the Act of August 16, 1940, *supra*, provided as follows:

“Hereafter, service in the Regular Army honorably terminated shall be credited for purposes of legal residence under the naturalization laws of the United States, regardless of the legality or illegality of the original entry into the United States of the alien, the certificate of the honorable termination of such service or a duly authenticated copy thereof made by a naturalization examiner of the Immigration and Naturalization Service being accepted in lieu of the certificate from the Department of Justice of the alien’s arrival in the United States required by the naturalization laws; and service so credited in each case shall be considered as having been performed immediately preceding the filing of the petition for naturalization.”

Appellee’s Army service from 1941 to 1945 brought him within the purview of that section, which operated to confer the following benefits upon him:

(a) The period of his Army service could be counted as legal residence in the United States for naturalization purposes;

(b) He was relieved of the requirement of establishing legal entry;

(c) His Army service was to be considered as having been performed immediately preceding the filing of a naturalization petition.

Section 324 of the Nationality Act of October 14, 1940, *supra*,<sup>1</sup> provided additional benefits to those who

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<sup>1</sup>Quoted in full in Appendix I, pp. i-iii of appellant’s brief.

had served a period aggregating three years in the armed forces, viz.:

(a) If the petition was filed while still in the service or within six months of discharge, the residence requirements for naturalization were entirely waived (subsection (a));

(b) If the petition was filed more than six months after discharge, the residence requirements were applicable but the military service was "considered as residence within the United States or the state" (subsection (d)).<sup>2</sup>

Appellee's service was in the regular Army (Philippine Scouts) subsequent to August 16, 1940 and such service aggregated a period in excess of three years. Thus, he was within the purview of both Section 2 of the Act of August 16, 1940, *supra*, and Section 324 of the Act of October 14, 1940, *supra*. Under the terms of the two sections just cited naturalization benefits appurtenant to appellee's Army service had accrued, therefore, as follows:

(a) He could use the period of his Army service as legal residence, regardless of how he might enter the United States;

(b) His Army service was regarded as having been performed immediately preceding the filing of a naturalization petition.

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<sup>2</sup>The waiver of a certificate of arrival specified in Section 324(b)(2), applied equally to those who filed within six months of discharge and those who filed later (*In re Mike Shaltupsky*, D.C. E.D. Mo.), unreported.

It is probable that the benefit last mentioned was intended to give those individuals whose service was in the regular Army and who were unable within six months after such service to get to a place where naturalization courts were operating, the same benefits as though the petition had been filed within six months after their discharge from the Army. But whether or not this particular result was intended by Congress in enacting Section 2 of the Act of August 16, 1940, *supra*, at the very least that statutory provision operated to require that the Army service be considered as having been performed within five years of the date of filing the petition for purposes of subsection (d), *supra*, of Section 324 of the Nationality Act of 1940. This being so, for the purposes of that particular subsection, obviously appellee could use the period of Army service as legal residence and could tack additional residence (whether legal or illegal—whether temporary or permanent) to the military service period to compute the five years' residence for purposes of said subsection (d).

The foregoing were substantive statutory rights which had accrued to appellee by reason of his service in the regular Army for a period in excess of three years. Even if his eligibility under subsection (a) of Section 324, *supra*, lapsed six months after the service terminated because of his inability to file a petition during that time (and we think it did not lapse, because the Act of August 16, 1940 mandatorily required that his particular service should be considered as having been performed "*immediately preceding* the



filing of the petition for naturalization'), nevertheless and in any event, his rights to use the military service as legal residence for purposes of subsection (d) when filing more than six months after termination of the service still remained to him.

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## 2. THE SAVINGS CLAUSE OF THE 1952 ACT PRESERVED APPELLEE'S RIGHTS.

The foregoing statutory provisions remained in effect until their repeal by the Immigration and Nationality Act of 1952 (See 66 Stat. 280, Section 403 (a)(41) and (42)) but the repealing statute, in Section 405 thereof (8 U.S.C.A. 1101 Note), contained a specific saving clause, as follows:

"Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed \* \* \* to affect \* \* \* any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such \* \* \* statutes (sic), conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect."

Interpreting that section, the United States Supreme Court in

*United States v. Menasche*, 348 U.S. 528, 75  
S.Ct. 513, 99 L.Ed. 615,

has said:

“The whole development in this general savings clause \* \* \* manifests a well established Congressional policy *not to strip aliens of advantages gained under prior laws*. The consistent broadening of the savings provision, particularly in its general terminology, indicates that the policy of preservation was intended to apply to matters both within and without the specific contemplations of Congress” (emphasis supplied).

In that case the Supreme Court also said:

“The change in the section was designed to extend a savings clause already broadly drawn, and embodies, we believe, Congressional acceptance of the principle that the statutory status quo was to continue *even as to rights not fully matured*” (emphasis supplied).

We might well stop here. The language of the savings clause is plain. As to any status or right or condition or thing or matter which had existed at the time of the repeal, the repealed statutes (Section 2 of the Act of August 16, 1940 and Section 324 of the Nationality Act of October 14, 1940, *supra*) were continued in force and effect. Thus, benefits which had accrued under those statutes were not to be abrogated nor destroyed by the repeal. The accrued benefits appurtenant to appellee's Army service were: (a) to consider that service as residence for naturalization purposes and as having been performed immediately prior to filing of a petition for naturalization, and (b) to relieve the veteran of the requirement of proving lawful admission for permanent residence.

The savings clause of the 1952 Act was designed to prevent such benefits from being swept away.

In *Petition of DeMayo*, (D.C. Cal. N.D.) 146 F.S. 759, the Court considered a case on all fours with the case at bar. In that case the petitioner had served honorably in the United States Army from September 1941 to May 1946, a period of slightly less than five years. He came to the United States under a temporary type of admission on August 15, 1955. He filed his petition for naturalization on January 5, 1956. In that case the Court said:

“This petition, filed January 5, 1956, entitles the petitioner to have completed five years of residence in the United States if his service in the U. S. Army may be counted.

“Under 8 U.S.C.A. Section 724(d) in the Nationality Act of 1940, veterans may be naturalized more than six months after they have completed their service in the armed forces if they can establish residence in the United States for the required period \* \* \* This section is supplemented by Section 2 of the Act (of August 16, 1940) \* \* \* These sections were repealed by the Immigration and Nationality Act of 1952, but the repealing legislation contained a savings clause, 8 U.S.C.A. Section 1101 Note.”

After citing the decision of this Court in *Aure v. United States*, 225 F.2d 88, and the decision of the Supreme Court in *United States v. Menasche*, supra, the court went on to say:

“In like manner in the case at bar, *DeMayo* enjoyed a certain status or condition when he

completed his tour of duty in the Army in 1946. This was a substantive right as distinguished from a procedural remedy. Under the then law he was eligible to utilize that service and substantial right in completing the five years of residence required for obtaining naturalization. Despite his diligent efforts to act on his rights in a timely manner, he was frustrated (because he was stationed where there was no designated representative), until the present time from proceeding to obtain his citizenship.<sup>3</sup> His status, however, was clearly established, and by reason of the savings clause it survived the repeal of the 1940 Act.

“*DeMayo* is now eligible to become a naturalized citizen of the United States of America.”

In *Aure v. United States*, supra, the appellant had more than three years' service in the Navy prior to the 1952 Act, and was still in the service when he filed his petition in 1953. This Court held that the rights which had accrued to him under Section 324(a) of the Nationality Act of 1940 were preserved by the savings clause of the 1952 Act, stating

“Clearly, it is the teaching of the *Menachse* case, and we are satisfied it was the intent of

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<sup>3</sup>In the case at bar appellee was prevented by causes beyond his control from petitioning for citizenship at an earlier time. He was unable to take advantage of the wartime provision for overseas naturalization (56 Stat. 182) because of serving in an area where no naturalization representative was available during the period of his service. He was unable to get to the United States to file a petition in a naturalization court, because he would have had to come under the quota which was preempted for approximately forty years by the waiting list (Cf. Report of President's Commission on Immigration and Naturalization—1953—page 104). It was only when he was sent here for hospital treatment that he was able to come under a temporary status.



Congress, that the savings clause is not limited to cases involving affirmative action \* \* \* but its preservation features should be extended to all substantive rights existing at the time the statute creating the rights was repealed.”

In that case this Court went on to say:

“The real test is whether the right which the alien seeks to have preserved by the savings clause is a substantive right, and in this regard we are mindful of the distinction between substantive rights and procedural remedies (citing cases).”

The *Aure* case did not involve Section 2 of the Act of August 16, 1940, *supra*, (which applied only to Army service), nor did it involve subsection (d) of Section 324 of the Nationality Act of 1940, since *Aure* was still in the Navy when the petition was filed. However, the principle established by the *Aure* and the *Menasche* cases, *supra*, is that advantages enjoyed by aliens under prior laws were preserved by the savings clause of the 1952 statute, and that this was so “even as to rights not fully matured,” provided only that it is a substantive right which is involved and not a mere procedural one.

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### 3. THE BENEFITS OF THE 1940 STATUTES SURVIVED.

Appellant argues that appellee cannot meet the requirements of subsection (d) of Section 324, *supra*, because his service had not been performed within five years immediately preceding the filing of the petition. But Section 2 of the Act of August 16, 1940, *supra*,



specifically provided that service in the regular Army "shall be considered as having been performed immediately preceding the filing of the petition for naturalization."

Appellant contends that Section 2 of the Act of August 16, 1940, *supra*, was repealed by implication by the passage of the Nationality Act of August 16, 1940, which repealed the Naturalization Act of 1906. The contention that there was an implied repeal of Section 2 of the Act of August 16, 1940, *supra*, before its express repeal by Section 403(a)(41) of the 1952 statute (66 Stats. 280) is untenable. It is elementary, of course, that repeals by implication are not favored. Moreover, the fact that Congress in the 1952 Act expressly repealed Section 2 of the Act of August 16, 1940 is clear proof that Congress considered the latter section to have been in effect up to that time.

Appellant also argues that the reference in Section 2 of the Act of August 16, 1940 to "the naturalization laws" could only mean the Naturalization Act of 1906 which was then in effect and that, when the 1906 Act was superseded by the Nationality Act of October 14, 1940, the provisions of the August Act were rendered ineffective. It is quite evident, however, that Congress at the time of passage of Section 2 of the Act of August 16, 1940 was already considering the codification of the naturalization laws which it enacted fifty-nine days later. A complete answer, moreover, is that the 82nd Congress, in passing the Immigration and Nationality Act of 1952, made express provision for the repeal of Section 2 of the Act of August 16, 1940,

supra, and thus demonstrated that Congress considered it as being in effect up to that time.

Appellant's suggestion that the legislative history of the Act of August 16, 1940 indicates that it was special legislation, applicable to a specific class of enlisted men whom Congress desired to protect, is without substance. That Act dealt with two separate and distinct matters. Section 1 of that Act was enacted to permit the reenlistment and continuation in service until June 30, 1943 of non-citizen servicemen who otherwise could not receive pay because of restrictions in Army appropriation acts which prohibited payments to non-citizen personnel (other than the Philippine Scouts). That section dealt with the matter of easing certain existing pay restrictions,<sup>4</sup> whereas, Section 2 of the Act was general in its terms, general in its coverage, and undertook to confer the specified privileges towards naturalization on the basis of any honorable service in the regular Army.

Clearly under Section 2, supra, appellee had the right to use his Army service as legal residence for purposes of naturalization as well as the additional right expressly provided in that section to have such service "considered as having been performed immediately preceding the filing of the petition for naturalization." Certainly these were substantive rights and not mere procedural ones. The statutory provisions under which they accrued were not repealed

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<sup>4</sup>Subsequent appropriation acts exempted all military personnel from the pay restrictions (56 Stat. 613; 57 Stat. 349; 58 Stat. 575).

until the enactment of the 1952 Act, and the savings clause of the latter Act is applicable to them (*United States v. Menasche*, supra; *Aure v. United States*, supra; *Petition of DeMayo*, supra). Appellant's argument that five years after the Army service terminated, appellee lost the right to use it for purposes of Section 324 of the Nationality Act of 1940, supra, flies directly into the face of the express language of Section 2 of the Act of August 16, 1940, supra, that "service so credited in each case shall be considered as having been performed immediately preceding the filing of the petition for naturalization."

The case of

*De La Cena v. United States*, C.A. 9, 249 F.2d  
341

which appellant cites, is clearly distinguishable because *De La Cena* had served less than three years prior to the repeal of the Nationality Act of 1940 and hence had never acquired the benefits of Section 324 of that Act, supra.

Appellant also contends that there was no eligibility or right to be naturalized which could be saved by Section 405(a) of the 1952 Act, supra, because appellee had no residence in the United States prior to the effective date of the latter statute. But the savings clause was designed to apply even "to rights not fully matured" (*United States v. Menasche*, supra), and appellee's Army service of more than three years gave him the statutory right to use the period of that service as lawful residence for naturalization purposes and to have it considered as having been performed

immediately prior to the filing of a petition for naturalization. Those rights were in existence when the 1952 Act came into effect. They were "advantages gained under prior laws" (*United States v. Menasche*, supra) and as such were within the scope of the general savings clause. The fact that appellee had been unable to get to the United States to exercise those rights certainly did not operate to take them out of the protection of the savings clause. There is, of course, a clear distinction between substantive rights, and the opportunity to exercise them, just as there is a clear distinction between substantive rights and procedural remedies (Cf. *Aure v. United States*, supra). The case of *Applications of Tano, et al.*, (D.C. Cal.) 139 F.S. 797, affirmed (C.A. 9) 237 F.2d 916, which appellant cites, is not in point because in that case the statutory right to be naturalized on the basis of sea service without a lawful admission had been terminated by express provision of the Internal Security Act of 1950, and was restored by the Immigration and Nationality Act of 1952 only to the extent of allowing such service performed prior to September 23, 1950, to be utilized *for a period of one year* without the necessity of showing lawful admission for permanent residence (8 U.S.C. Section 1441(a)(2)).

Little comment is needed to dispose of the argument that the United States would be precluded from making inquiry as to a petitioner's character, etc. if the rights hereinbefore discussed are now recognized. The Army records are available as to appellee's conduct and behavior during his more than four years of



Army service (which by statute is considered as having been performed immediately preceding the filing of the petition), and his character and behavior during the year of his physical presence in the United States is open to the same type of investigation which is customary in all other naturalization cases.

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### CONCLUSION.

Under the Acts of August 16, 1940 and October 14, 1940, *supra*, appellee, by reason of his service for more than three years in the regular Army, derived certain benefits, privileges and rights toward naturalization, i.e., to use said service for purposes of legal residence under the naturalization laws, to have it considered as having been performed immediately preceding the filing of a petition for naturalization, and to qualify for naturalization without the necessity of establishing legal entry for permanent residence. The statutory provisions which conferred these rights upon him on the basis of his Army service were not repealed until the 1952 Immigration and Nationality Act came into effect and the savings clause of Section 405(a) of that Act, *supra*, preserved the advantages and rights which had accrued under the earlier statutes. These were substantive rights and the fact that appellee, because of circumstances beyond his control, was unable to proceed to exercise them until after 1952 does not change or detract from the broad effect of the savings clause; the intent of that savings clause was to insure that aliens would not be stripped of



advantages gained under prior laws and this purpose was intended to apply even as to rights not fully matured (*United States v. Menasche*, supra; *Aure v. United States*, supra; *Petition of DeMayo*, supra).

We respectfully submit that the judgment of the court below granting appellee's petition for naturalization was correct and should be affirmed.

Dated, San Francisco, California,  
May 8, 1959.

Respectfully submitted,

NORMAN STILLER,

PHELAN & SIMMONS,

*Attorneys for Appellee.*

No. 16197 ✓

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United States  
Court of Appeals  
for the Ninth Circuit

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J. M. DUNGAN, Trustee in Bankruptcy of the  
Estate of Warren Elwood Scarbrough, Bank-  
rupt, Appellant,

vs.

WARREN ELWOOD SCARBROUGH,  
Appellee.

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Transcript of Record

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Appeal from the United States District Court for the  
Northern District of California, Southern Division

FILED

FEB 17 1959

PAUL P. O'BRIEN, CLERK



No. 16197

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United States  
Court of Appeals  
for the Ninth Circuit

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J. M. DUNGAN, Trustee in Bankruptcy of the  
Estate of Warren Elwood Scarbrough, Bank-  
rupt, Appellant,

vs.

WARREN ELWOOD SCARBROUGH,  
Appellee.

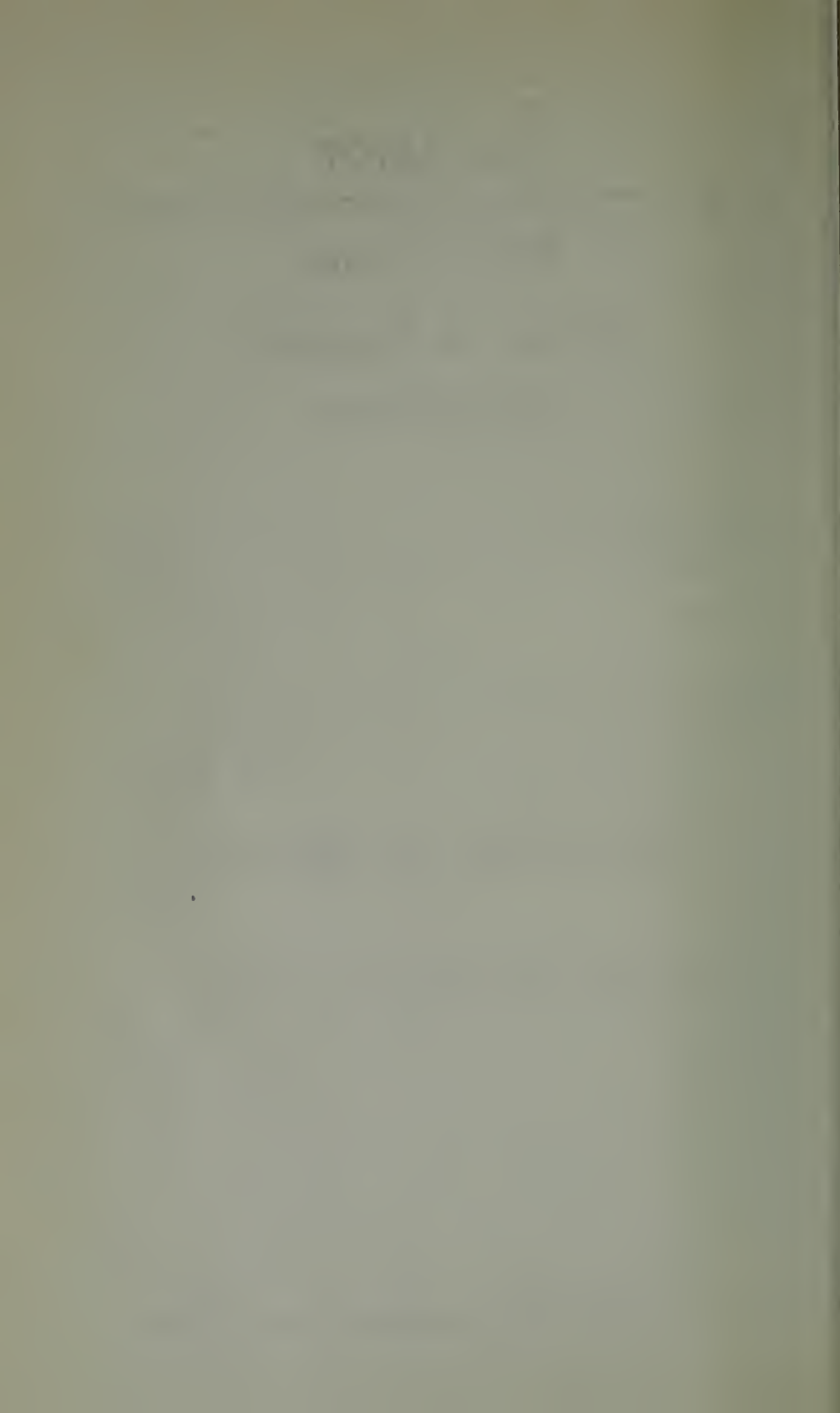
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Transcript of Record

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Appeal from the United States District Court for the  
Northern District of California, Southern Division

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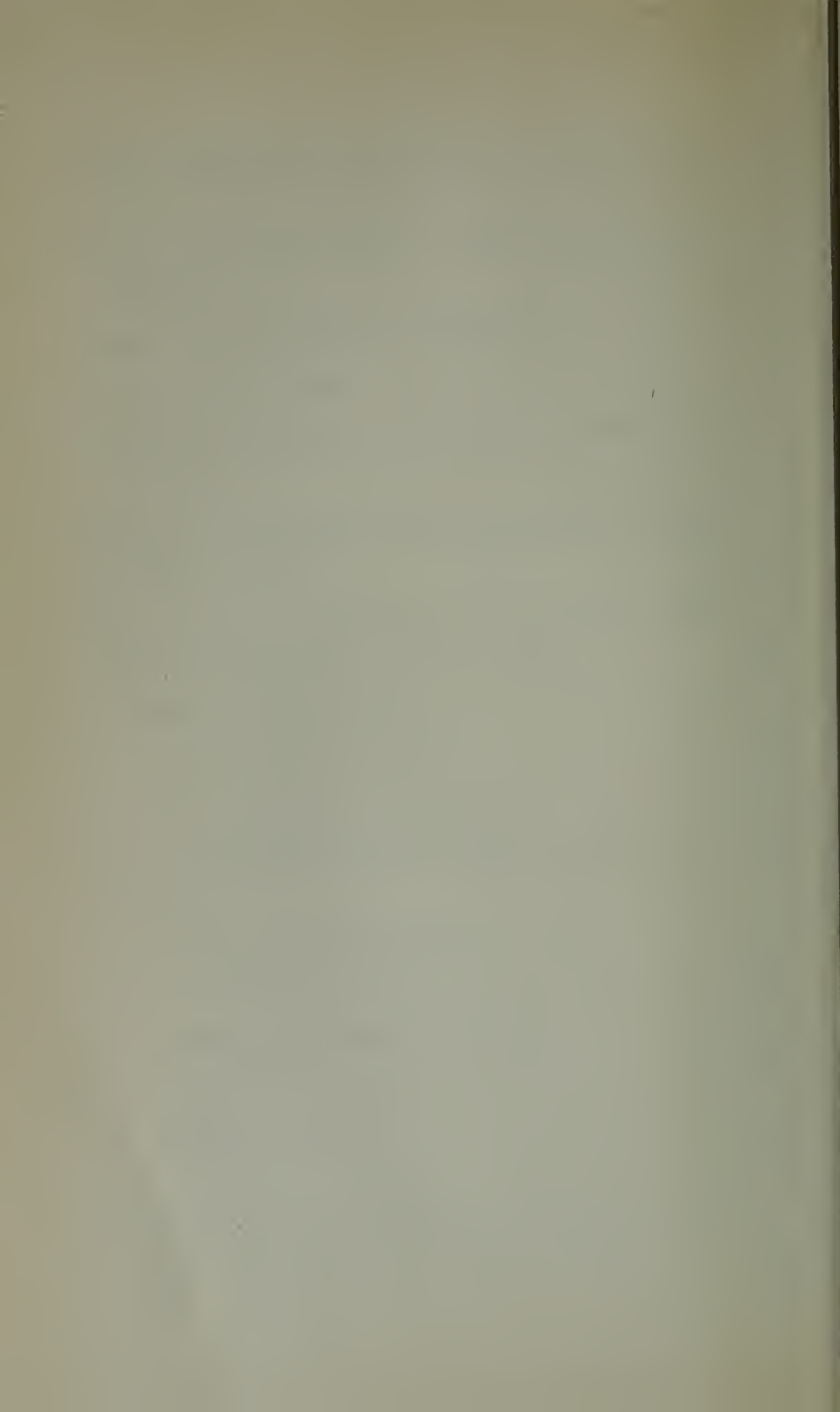
[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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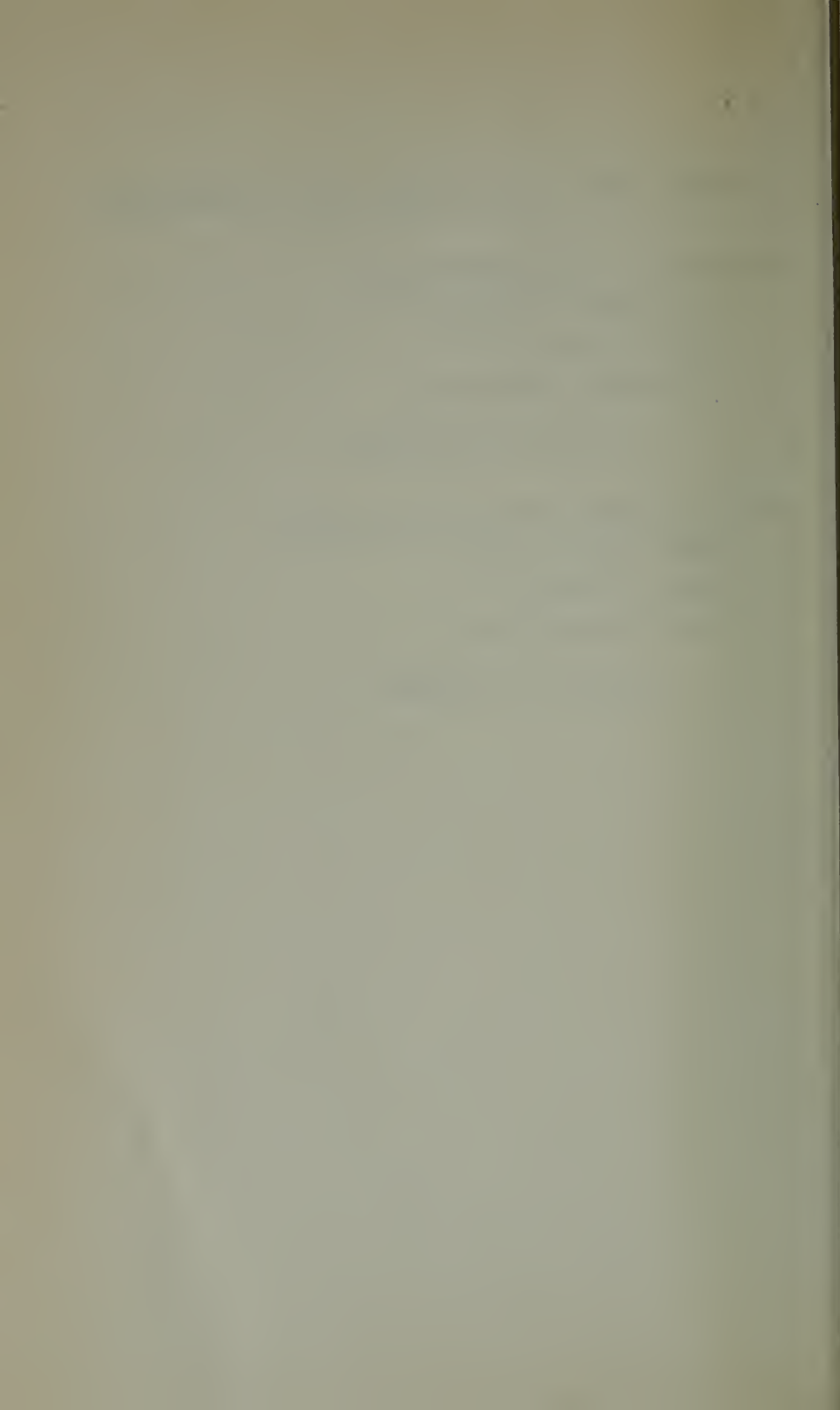
1095 Market Street,

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Attorney for Appellee.





United States District Court, Northern District  
of California, Southern Division

No. 46588—In Bankruptcy

In the Matter of  
WARREN ELWOOD SCARBROUGH,  
Bankrupt.

TRUSTEE'S PETITION FOR LEAVE  
TO SELL REAL PROPERTY

Comes now J. M. Dungan, and respectfully represents:

That he is the duly appointed, qualified and acting Trustee of the estate of the Bankrupt above-named.

That among the assets of said Bankrupt's estate is an undivided one-half ( $1\frac{1}{2}$ ) interest in and to the following described real property, situate, lying and being in the County of Santa Cruz, State of California, more particularly described as follows, viz:

Being Lot 18, as the same is shown upon the map entitled, "Amended Map of W. H. Weeks Subdivision of a part of the City of Watsonville," filed for record in the Office of the County Recorder of said Santa Cruz County February 23, 1905, in Map Book 15, at page 2.

That on or about the 25th day of September, 1952 the above-named Bankrupt recorded in the office of the County Recorder of said County of Santa Cruz in Vol. 886, Page 141, of Official Records, a Declara-

tion of Homestead covering the premises above-described, but that said Bankrupt has waived his claim to exemption of his interest in said real property as above-described by his failure to claim his said interest therein exempt herein in his Schedule B-5 heretofore filed herein.

That the interest of said Bankrupt in the real property is reasonably worth approximately \$12,500.00 and is free and clear of all liens and encumbrances and that it would, therefore, be to the best interests of the above estate that the relief hereinafter prayed for be by this Court granted.

Wherefore, your Petitioner prays that due notice of the hearing of this Petition be given to the creditors herein, and that upon said hearing an Order be made authorizing your Petitioner to sell the interest of the above-named Bankrupt's estate in and to the real property hereinabove more particularly described at either public or private sale, and upon such additional notice, if any, as the Court may prescribe, subject to confirmation by this Court; and for such other, further and additional relief as to this Honorable Court may seem proper in the premises.

J. M. DUNGAN,  
Trustee,

/s/ By ARTHUR P. SHAPRO,  
One of his Attorneys.

Duly Verified.

[Endorsed]: Filed February 19, 1957.

[Title of District Court and Cause.]

APPOINTMENT—OATH AND REPORT  
OF APPRAISER

Know All Men By These Presents:

It Is Ordered That C. H. Waller, be and he is hereby appointed Appraiser to appraise the real and personal property belonging to the estate of said bankrupt set out on the schedules now on file in this Court and report his appraisal to the Court, said appraisal to be made as soon as may be and the Appraiser duly sworn.

The fee for said Appraiser being hereby fixed at \$25.00 per day.

Witness my hand this 5th day of February, 1957.

/s/ BERNARD J. ABROTT,  
Referee in Bankruptcy.

Northern District of California:

County of Monterey—ss.

Personally appeared the within C. H. Waller and made oath that he will fully and fairly appraise the aforesaid real property to the best of his skill and judgment.

/s/ C. H. WALLER.

Subscribed and sworn to before me this 5th day of February, 1957.

[Seal] /s/ EDNA BROYLES,  
Notary Public in and for the County of Monterey,  
State of California.

I, the undersigned, having been notified that I was appointed to estimate and appraise the real and personal property aforesaid and having attended to the duties assigned to me, and after a strict examination and careful inquiry, I do estimate and appraise the same as follows:

Real estate located at 410 Palm Ave., Watsonville. \$22,500.00.

In Witness Whereof, I have hereunto set my hand and seal this 5th day of February, 1957.

C. H. WALLER,  
Appraiser.

[Endorsed]: Filed February 15, 1957.

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[Title of District Court and Cause.]

ANSWER AND EXCEPTIONS TO TRUSTEE'S  
PETITION FOR LEAVE TO SELL REAL  
PROPERTY

The answer of Warren Elwood Scarbrough to the petition of J. M. Dungan for an order authorizing the sale of an undivided one-half ( $\frac{1}{2}$ ) interest in that certain real property as described in said petition dated February 18, 1957 on file herein respectfully represents:

I.

That Warren Elwood Scarbrough, Bankrupt, on or about the 25th day of September 1952, recorded in the Office of the County Recorder of the County of Santa Cruz in Volume 886, Page 141, of Official



Records of said County a Declaration of Homestead covering the premises as described in said petition.

II.

That said Warren Elwood Scarbrough claimed an exemption of his interest in said real property in his Amended Schedule B-5 filed August 20, 1956 on file herein.

III.

That the interest of said Warren Elwood Scarbrough is reasonably worth less than \$12,500.00 and that it would be to the best interests of the above estate that the relief prayed for be denied.

Wherefore, respondent prays that the petition of the trustee be denied; and for such other, further and additional relief as may seem proper in the premises.

/s/ WARREN ELWOOD

SCARBROUGH,

Respondent.

/s/ PHILANDER BROOKS BEADLE,

Attorney for Respondent.

Duly Verified.

[Endorsed]: Filed March 7, 1957.

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[Title of District Court and Cause.]

ORDER AUTHORIZING TRUSTEE'S SALE  
OF REAL PROPERTY

The duly verified Petition for leave to sell certain real property, more particularly therein and here-

inafter described, having regularly come on for hearing before the above-entitled Court on the 8th day of March, 1957, said Trustee being represented by Messrs. Shapro & Rothschild (Arthur P. Shapro, Esq., appearing), his attorneys, and the Bankrupt above-named having, by and through Philander Brooks Beadle, Esq., his attorney, filed herein his Answer and his exceptions to said Trustee's Petition for Leave to Sell Real Property; and evidence, both oral and documentary, having been adduced by the respective parties upon the issues so joined; and the matter having been duly argued and submitted to the Court for decision, and the Court being fully advised in the premises Finds

1. That at the time of the commencement of the above-entitled proceedings, said Bankrupt and Mary Scarbrough, his wife, were the owners, in joint tenancy, of the following described real property, situate, lying, and being in the County of Santa Cruz, State of California, viz:

Being Lot 18, as the same is shown upon the map entitled, "Amended Map of W. H. Weeks Subdivision of a part of the City of Watsonville," filed for record in the Office of the County Recorder of said Santa Cruz County February 23, 1905, in Map Book 15, at page 2.

2. That on or about the 25th day of September, 1952, the above-named Bankrupt recorded in the office of the County Recorder in said County of Santa Cruz, in Vol. 886 of Official Records, at p. 141, a Declaration of Homestead covering the prem-

ises above described; and that, by amendment to his Schedule B-5 herein made and allowed by this Court, under date of August 22, 1956, said Bankrupt claimed the above described premises exempt as a Homestead pursuant to the provisions of Section 1240 of the Civil Code of California.

3. That said real property was at the time of the commencement of the above-entitled proceedings, and still is, reasonably worth the sum of \$22,500.00.

Wherefrom the Court Concludes

1. That by virtue of the adjudication in Bankruptcy herein, J. M. Dungan, Trustee of the estate of the above-named Bankrupt acquired an undivided one-half interest in and to the above-described property as of the 10th day of May, 1956, and ever since has been, and still is, a tenant in common of said real property to that extent with said Mary Scarbrough, wife of said Bankrupt.

2. That, by virtue of his said Declaration of Homestead, both said Bankrupt and said Mary Scarbrough acquired an exemption therein to the extent of \$12,500.00, and no more, and that, therefore, the maximum exemption in said real property allowable to said Bankrupt is the sum of \$6,250.00; and

3. That the interest of said Bankrupt estate is reasonably worth the sum of \$11,250.00, subject to the said Homestead exemption of \$6,250.00.

And good cause appearing therefor,

It Is Hereby Ordered, Adjudged, and Decreed

that said Trustee be, and he is hereby authorized to sell the undivided one-half interest of said Bankrupt estate in and to the real property more particularly hereinabove described, at either public or private sale, and subject to confirmation by this Court, without further notice to creditors, provided that, within fifteen days from and after the date of entry of this Order said Bankrupt and/or said Mary Scarbrough, his wife, shall not have paid to said Trustee the sum of \$5,000.00 in full compensation for the non-exempt interest of said Bankrupt estate in and to said real property; and

It Is Further Ordered, Adjudged, and Decreed that if such payment of \$5,000.00 shall be so timely made to said Trustee, said Trustee shall convey to said wife of said Bankrupt all of the right, title, and interest of the above-named Bankrupt estate in and to said real property; or, in the event that such payment be not so timely made, as hereinabove provided, from the proceeds of said Trustee's sale of said one-half interest of said Bankrupt therein, there shall be paid to said Bankrupt by said Trustee, in full satisfaction of his said claim of exemption to said real property, the sum of \$6,250.00, and no more.

Dated: At San Jose, in said District, this 17th day of July, 1957.

/s/ BERNARD J. ABROTT,  
Referee in Bankruptcy.

[Endorsed]: Filed July 17, 1957.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE  
PETITION FOR REVIEW

The Court being fully advised that the Bankrupt intends to file a petition for review of that certain order made and entered on July 17, 1957, pertaining to the homestead exemption claimed by the Bankrupt herein, and this being a proper case for the making of the order following, and good cause appearing therefor,

It Is Hereby Ordered that said Bankrupt shall have an extension of time within which to file said petition for review to and including August 9th, 1957.

Dated: July 25th, 1957.

/s/ BERNARD J. ABROTT,  
Referee in Bankruptcy.

[Endorsed]: Filed July 25, 1957.

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[Title of District Court and Cause.]

PETITION FOR REVIEW

To the Honorable Bernard J. Abrott, Referee in  
Bankruptcy:

The petition of Warren Elwood Scarbrough respectfully represents:

1. Your petitioner is the Bankrupt in the above entitled action and is aggrieved by the order herein of Bernard J. Abrott, Referee in Bankruptcy,



dated July 17, 1957, a copy of which order is annexed hereto, marked Exhibit "A," and made a part hereof.

2. Said order was and is erroneous in each of the following respects:

(a) Said order is against the law.

(b) The Referee, in making said order, erred by:

(1) Concluding that J. M. Dungan, Trustee of the estate of the above-named Bankrupt, acquired an undivided one-half interest [and became a tenant in common to that extent with Mary Scarbrough, wife of the Bankrupt] in the real property described as follows:

Real property, situate, lying, and being in the County of Santa Cruz, State of California, viz: Lot 18, as the same is shown upon the map entitled, "Amended Map of W. H. Weeks Subdivision of a part of the City of Watsonville," filed for record in the Office of the County Recorder of said Santa Cruz County February 23, 1905, in Map Book 15, at page 2.

(2) Concluding that by virtue of the Bankrupt's Declaration of Homestead both he and his wife, Mary Scarbrough, acquired an exemption to the extent of \$12,500.; that said exemption must be apportioned between them; and that therefore the maximum exemption in said real property allowable to the Bankrupt is the sum of \$6,250.

(3) Refusing to follow the California rule of law laid down in the case of *Strangman v. Duke* (1956), 140 C.A. 2d 185, wherein it was held that the Bank-

rupt's interest in the property, as against the Trustee in Bankruptcy, was exempt if the undivided interest was less than the amount of the statutory exemption.

Wherefore, your petitioner prays that your Honor prepare the record and certify to the Judge of this Court and transmit to the Clerk the record in the proceeding having to do with or in any manner bearing upon the order aforesaid, as provided in §39 of the Bankruptcy Act; that said order of said Referee be reviewed by a Judge of this Court in accordance with the provisions of the Act of Congress relating to Bankruptcy; that said order be reversed and set aside; that an order be made allowing the Bankrupt a Homestead exemption in the sum of \$12,500.; and for such other, further and different order as may be meet and just in the premises.

/s/ WARREN ELWOOD  
SCARBROUGH,  
Bankrupt.

PHILANDER BROOKS BEADLE,  
JOHN T. TULLY,

/s/ By JOHN T. TULLY,  
Attorneys for Petitioner.

Duly Verified.

[Note: Exhibit "A" — "Order Authorizing Trustee's Sale of Real Property," is the same as set out at pages 7-10.]

[Endorsed]: Filed August 5, 1957.

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON PETITION  
FOR REVIEW OF ORDER AUTHORIZ-  
ING TRUSTEE'S SALE OF REAL PROP-  
ERTY

The undersigned, one of the Referees in Bankruptcy to whom the above-entitled proceeding has been duly referred, in accordance with the provisions of Section 39(c) of the Bankruptcy Act, hereby certifies as follows:

Statement of Proceedings

The above-entitled proceeding was commenced by the filing of a petition for relief pursuant to the provisions of Chapter XI of the Bankruptcy Act on the 10th day of May, 1956; thereafter, and on the 17th day of August, 1956, said petitioning debtor was duly adjudged bankrupt herein and J. M. Dungan, of Salinas, California, was duly appointed and thereafter duly qualified as and still is acting as Trustee of the estate of the above-named bankrupt. Thereafter, said Trustee filed herein his petition for leave to sell the bankrupt's undivided one-half interest in and to the following described real property, situate, lying and being in the County of Santa Cruz, State of California:

Being Lot 18, as the same is shown upon the map entitled, "Amended Map of W. H. Weeks Subdivision of a part of the City of Watsonville," filed for record in the Office of the County Recorder of said

Santa Cruz County February 23, 1905, in Map Book 15, at page 2.

On February 21, 1957, in accordance with the provisions of Section 58a(4) of the Bankruptcy Act, notice was given to the creditors by the undersigned Referee in Bankruptcy of the hearing of said Trustee's Petition for Leave to Sell Real Property. Said petition came on for hearing before the undersigned Referee in Bankruptcy on the 8th day of March, 1957, prior to which the above-named bankrupt had filed herein his Answer and Exceptions to said Trustee's petition. At said hearing, said bankrupt was personally present and represented by Philander Brooks Beadle, his attorney, and said Trustee was represented by Messrs. Shapro & Rothschild (Arthur P. Shapro, Esq., appearing), his attorneys. The facts with respect to the issues so joined were stipulated to by the parties in accordance with the pleadings, except that the Trustee withdrew his claim that the bankrupt had waived his claim to exemption of his interest to the above-described real property by his failure to claim same exempt in his Schedule B-5 theretofore filed herein, by reason of the fact that at the time of the filing of said Trustee's Petition for Leave to Sell Real Property, said Trustee had not been informed of the filing by said bankrupt on the 22nd day of August, 1956 of an amendment to his Schedule B-5 in which said bankrupt claimed his said interest in the above-described real property to be exempt pursuant to the provisions of Section 1240 of the Civil Code of California.

After partial oral argument by counsel for the respective parties upon the issues so joined, the matter was ordered submitted to the undersigned Referee in Bankruptcy for decision upon briefs to be filed by the respective parties. Said bankrupt filed herein his opening and reply brief and said Trustee filed herein his reply brief.

Thereafter, and after due consideration of the said issues involved, and of the records, papers, and files herein, the undersigned Referee in Bankruptcy made and filed herein the following Findings of Fact:

1. That at the time of the commencement of the above-entitled proceeding, said Bankrupt and Mary Scarbrough, his wife, were the owners, in joint tenancy of the following described real property, situate, lying, and being in the County of Santa Cruz, State of California, viz.:

Being Lot 18, as the same is shown upon the map entitled, "Amended Map of W. H. Weeks Subdivision of a part of the City of Watsonville," filed for record in the Office of the County Recorder of said Santa Cruz County February 23, 1905, in Map Book 15, at page 2.

2. That on or about the 25th day of September, 1952, the above-named Bankrupt recorded in the office of the County Recorder in said County of Santa Cruz, in Vol. 886 of Official Records, at p. 141, a Declaration of Homestead covering the premises above described; and that, by amendment to his Schedule B-5 herein made and allowed by this Court, under date of August 22, 1956, said Bank-



rupt claimed the above-described premises exempt as a Homestead pursuant to the provisions of Section 1240 of the Civil Code of California.

3. That said real property was at the time of the commencement of the above-entitled proceeding, and still is, reasonably worth the sum of \$22,500.00.

Wherefrom, the Court Concluded:

1. That by virtue of the adjudication in Bankruptcy herein, J. M. Dungan, Trustee of the estate of the above-named Bankrupt acquired an undivided one-half interest in and to the above-described property as of the 10th day of May, 1956, and ever since has been, and still is, a tenant in common of said real property to that extent with said Mary Scarbrough, wife of said Bankrupt.

2. That, by virtue of his said Declaration of Homestead, both said Bankrupt and said Mary Scarbrough acquired an exemption therein to the extent of \$12,500.00, and no more, and that, therefore, the maximum exemption to said real property allowable to said Bankrupt is the sum of \$6,250.00; and

3. That the interest of said Bankrupt estate is reasonably worth the sum of \$11,250.00, subject to the said Homestead exemption of \$6,250.00.

### Opinion

In reaching the foregoing conclusions and in making that certain "Order Authorizing Trustee's Sale of Real Property" dated July 17, 1957, from which said order bankrupt timely filed the instant Petition for Review, the undersigned Referee in Bankruptcy

was primarily influenced by the decision of the United States Court of Appeals for the 9th Circuit in *Russell v. Laugharn*, 20 Fed. 2d 95, wherein, in a case on all fours with the case at bar the Court of Appeals held:

“as to homestead, where wife bought property paying on the purchase price \$2,000 of her separate money and \$5,500 of community funds and filed a declaration of homestead thereon, and afterwards became bankrupt, that the maximum homestead exemption of \$5,000 should be apportioned ratably to the two estates (husband's and wife's) so that the value of the property being the same as when bought, only one-third of her \$2,000 interest is subject to her debts; the community interest not being subject thereto.”

In that decision, the Court of Appeals reviewed the applicable California law and cited numerous other cases in the California State Courts to like effect.

The undersigned Referee in Bankruptcy felt that, in the case at bar, the conveyance by the bankrupt to him and wife of the property, which was community property in the first place, created a gift (in the form of separate property) to the wife of what is now the other (her) undivided one-half interest in the above-described real property. The inability of the wife, legally, to declare a valid homestead upon the husband's interest alone in property held by them (as here) as joint tenants is supported by the decision of the California Supreme Court in

Estate of Davidson, 159 Cal. 98. See also California Civil Code Sec. 1239.

Dated at Oakland in said District this 6th day of May, 1958.

Respectfully submitted,

/s/ BERNARD J. ABROTT,  
Referee in Bankruptcy.

Original Documents Transmitted  
With This Certificate

1. Trustee's Petition for Leave to Sell Real Property.
2. Answer and Exceptions to Same.
3. Bankrupt's Opening Brief.
4. Trustee's Reply Brief.
5. Bankrupt's Reply Brief.
6. Order Authorizing Trustee's Sale of Real Property (dated July 17, 1957).
7. Order Extending Time to File Petition for Review (to August 9, 1957).
8. Petition for Review.
9. Bankrupt's Exhibit No. 3, Grant Deed Crossetti, et al. to Bankrupt.
10. Bankrupt's Exhibit No. 2, Declaration of Homestead.
11. Bankrupt's Exhibit No. 1, Joint Tenancy Deed from Bankrupt to Bankrupt and wife.
12. Appointment, Oath and Report of Appraiser (on real property at 410 Palm Avenue, Watsonville) dated February 5, 1957.

[Endorsed]: Filed May 7, 1958.

In the United States District Court, Northern  
District of California, Southern Division

No. 46588

In the Matter of  
WARREN ELWOOD SCARBROUGH,  
Bankrupt.

### ORDER VACATING ORDER OF REFEREE

The bankrupt petitions for review of an order by the Referee authorizing the Trustee of the bankrupt's estate to sell an undivided one-half interest in certain homesteaded property owned by the bankrupt and his wife in joint tenancy. In his order the Referee found the reasonable value of the homesteaded property to be \$22,500.00. He held that the bankrupt's declaration of homestead, in which the wife did not join, entitled the bankrupt and his wife to a combined exemption in the amount of \$12,500.00, and the bankrupt to a pro rata exemption of one-half that amount, or \$6,250.00. He therefore authorized the Trustee to sell the bankrupt's undivided interest in the property and to pay to the bankrupt the first \$6,250.00 of the proceeds in satisfaction of his exemption, unless within fifteen days the bankrupt or his wife paid the Trustee \$5,000.00 in compensation for the bankrupt's non-exempt interest.

In support of his order the Referee relied upon *Russell v. Laugharn*, 20 F.2d 95, a case decided by the Court of Appeals of this circuit in 1927. In that case, a bankruptcy proceeding against a wife, the Court found that certain property homesteaded by

the wife was in part her separate property and in part community property not subject to her debts, the interests of the community and the wife being undivided. The Court held that the homestead exemption should be ratably apportioned between the wife's interest and the community interest. No California decision was cited by the Court of Appeals as authority for its conclusion that the homestead exemption was apportionable.

Upon the present petition for review, the bankrupt relies upon a subsequent decision by the California District Court of Appeals, *Strangman v. Duke*, 140 C.A. 2d 185 (2d Dist. 1956), squarely holding that a husband who files a homestead declaration, in which his wife does not join, on property one-half of which is his wife's separate property and one-half of which is held in joint tenancy, is entitled to have the entire homestead exemption applied to his undivided one-fourth interest. The California court states in its decision that the homestead exemption provided by California law is not apportionable.

Thus, while the decision of the federal Court of Appeals in *Russell v. Laugharn* represented that Court's view of the California law at that time, it can no longer be applied in a situation where a California court has announced a different rule. The state courts, not the federal courts, are the final arbiters of the state law, and this is true even though the announcement of state law is made by an intermediate state appellate court. *Six Companies of California v. Joint Highway District No. 13*



of California, 311 U.S. 180 (1940); *West v. American Telephone and Telegraph Co.*, 311 U.S. 223 (1940).

Thus *Strangman v. Duke* represents the California law to be applied in the present case. It is true that there is an earlier decision by the California District Court of Appeals in another District in *In re Rauer's Collection Co.*, 87 C.A. 2d 248 (1st Dist. 1948) which formulated a rule regarding the homestead exemption which seems different in principle from the rule announced in *Strangman v. Duke*.<sup>1</sup> But, *In re Rauer's Collection Co.*, differs from *Strangman v. Duke* and the present case on its facts in that there both husband and wife joined in the homestead declaration.

*Strangman v. Duke*, being factually the same as the present case, must be accepted as stating the applicable law. The Referee erred in failing to apply the California law as announced in that decision. His order authorizing the sale of the bankrupt's undivided one-half interest in the homesteaded property must be and is hereby vacated.

Dated: June 30, 1958.

/s/ LOUIS E. GOODMAN,  
Chief Judge.

[Endorsed]: Filed June 30, 1958.

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<sup>1</sup> In *In re Rauer's Collection Co.*, a husband and wife had joined in a homestead declaration on property held in joint tenancy. The Court held that the homestead exemption thus acquired should be applied against the entire property, and if it were sold for a sum in excess of the exemption, the husband's creditors could reach one-half of the excess.

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice Is Hereby Given that J. M. Dungan, the duly appointed, qualified and acting Trustee of the estate of the above-named Bankrupt, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final Order of the Honorable Louis E. Goodman, Chief Judge of the above-entitled Court, signed and filed on the 30th day of June, 1958 vacating the Order of Hon. Bernard J. Abrott, Referee in Bankruptcy, authorizing the Trustee's sale of certain real property dated and filed on the 17th day of July, 1957, and from the whole thereof.

Dated at San Francisco in said District this 7th day of August, 1958.

SHAPRO & ROTHSCHILD,

/s/ By ARTHUR P. SHAPRO,

Attorneys for J. M. Dungan, Trustee of the Estate  
of Warren Elwood Scarbrough, Bankrupt.

[Endorsed]: Filed August 8, 1958.

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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, Southern Division, do hereby certify that the foregoing documents, listed below, are the originals filed in this Court in the above-entitled case and that

they constitute the record on appeal herein, as designated by the attorneys for the Appellant:

Extension of Time.

Order Vacating Order of Referee.

Referee's Certificate on Petition for Review for Sale of Real Property.

Petition for Review.

Order Authorizing Trustee's Sale of Real Property.

Bankrupt's Reply Brief.

Trustee's Reply Brief.

Bankrupts Opening Brief.

Answer & Exceptions to Trustee's Petition.

Trustee's Petition for Leave to Sell Real Property.

Grant Deed to J. J. Crosetti.

Declaration of Homestead by Husband.

Joint Tenancy Deed.

Transcript on further Hearing to Show Cause.

Transcript on Motion to Dismiss Trustee's Petition.

Notice of Appeal.

Designation of Contents of Record on Appeal.

Order extending time to file petition for review.

Appointment, Oath, and Report of Appraiser.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court this 22nd day of September, 1958.

[Seal]

C. W. CALBREATH,

Clerk,

/s/ By WM. J. FLINN,

Deputy Clerk.

In the Southern Division of the United States District Court, Northern District of California

In Bankruptcy—No. 46588

In the Matter of  
WARREN ELWOOD SCARBROUGH,  
Bankrupt.

FURTHER HEARING ON ORDER TO  
SHOW CAUSE

Before Hon. Bernard J. Abrott, Referee in Bankruptcy, in Room A, Civic Auditorium.

San Jose, California—March 22, 1957

Appearances: Arthur P. Shapro, Esq., of the law firm of Shapro & Rothschild, 155 Montgomery Street, San Francisco, California. For the Trustee. P. B. Beadle, Esq., 1095 Market Street, San Francisco, California. For the Bankrupt.

The Court: Now, the Order to Show Cause in the Scarbrough matter; further hearing.

Mr. Shapro: Yes, on the petition for an order permitting the Trustee to sell certain personal property which consists of a tomato packing shed, located on the Southern Pacific Company property on West Lake Street in Salinas, free and clear of any interest or lien of Mrs. Scarbrough. In that matter Mrs. Scarbrough has filed an Answer in propria persona in which that issue is joined and on which we are prepared to proceed at this time.

Mr. Beadle: I might say it was filed in propria

persona because, Mr. Shapro, you thought that I might be disqualified.

The Court: I am not so sure that Mr. Shapro was alone in that; the Court made the suggestion here in front of your associate, Mr. Beadle. There is one major reason, and that is that the Bankrupt's attorney has the obligation to recover the maximum, as far as assets are concerned, for the benefit of all creditors, and the Bankrupt is not in a position to resist—other than for exemptions, which is proper. Consequently, how can the attorney for the Bankrupt, who has the obligation to recover assets for the benefit of creditors, resist an order to show cause where the Trustee is attempting to recover assets? I mean there is a conflict of interests. However, I did comment before, and if it wasn't clear I will comment again, that in the event Mrs. Scarbrough feels that she desires counsel, and if she came here under the impression [1]\* that either you or your associate would be in a position to defend her rights and represent her, I will afford her an opportunity, by granting a continuance, for her to decide whether or not she should be represented.

Mr. Shapro: That is right. She has been very fair with me in all matters and I certainly don't want to take any advantage now——

Mr. Beadle: Because we realize that there is that protection due to her—How do you feel about that; Mr. Timmins was asked to be here——

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\* Page numbers appearing at top of page of Reporter's Transcript of Record.



The Court: Mrs. Scarbrough, this is entirely for your protection as far as you and I are concerned, and is said for your benefit. It is entirely possible in this meeting that matters might come up where you would need the protection of an attorney as far as you are concerned, and in the event you do proceed now without counsel—because as far as any attorney that is here now there is no one that I know of that is going to represent your interests and, as far as I am concerned, I will afford you an opportunity to obtain independent counsel, and will continue the hearing to give you that opportunity.

Mrs. Scarbrough: Would that be better?

The Court: I think it would, if you are going to testify under oath.

Mr. Beadle: I suggest that the matter go on today, and if anything does come up the hearing can be continued.

Mr. Shapro: I have no objection. [2]

The Court: Is that your wish, Mrs. Scarbrough?

Mrs. Scarbrough: Yes.

The Court: Proceed.

### MRS. MARY SCARBROUGH

Being duly sworn by the Court, testified on behalf of the Trustee as follows:

#### Direct Examination

Q. (By the Court): Your first name, Mrs. Scarbrough, is Mary? A. Mary.

Q. And you are the wife of Warren Elwood Scarbrough, the Bankrupt in this matter?

(Testimony of Mrs. Mary Scarbrough.)

A. Yes, I am.

Mr. Shapro: Your Honor may recall that at a hearing in this matter when Mrs. Scarbrough was examined under 21A,—it was on January 4, 1957,—in connection with the general subject matter of this controversy, there were at that time here in court certain records of the Bankrupt which Mr. Scarbrough testified concerning. I asked him to have those records here again. Mr. Scarbrough, are those records here today?

Mr. Scarbrough: Yes, sir.

Mr. Shapro: Then I think, your Honor, that I can proceed briefly with Mrs. Scarbrough, and call Mr. Scarbrough after she has testified.

The Court: Very well.

Q. (By Mr. Shapro): Mrs. Scarbrough, on or about March 21, 1953 you advanced to the Ship Shape Packing Co. the sum of \$1,000.00?

A. Yes, I did. [3]

Q. And again on April 15, 1953 the further sum of \$4,000.00? A. Yes.

Q. And that money came, did it, from your own bank account? A. Yes, from my own savings.

Q. As I understand—correct me if I am wrong—the understanding between you and your husband at that time was that the \$5,000.00 would be used to purchased the shed we are talking about?

A. Yes,—for me.

Q. What, if anything, did you personally have to do with the negotiations for the purchase of this shed?

(Testimony of Mrs. Mary Scarbrough.)

A. I had nothing to do with it other than advancing the money; and there was a lapse of time due to one of the owners being in Europe——

Q. You don't know that of your own knowledge?

A. No, I don't.

Q. Please then—the question of delay will come up later; your husband will be able to testify about it because he knows. You did not have any negotiations?      A. No.

Q. Your understanding was that your husband would purchase the shed with the four thousand and the one thousand that you gave him within those few days less than a month?      A. Yes.

Q. When did you first learn that the shed had been purchased in your husband's name?

A. Well, I knew he purchased it but I thought a bill of sale had been made from——

Q. From him to you?

A. From him to me. [4]

Q. When did you first learn that there had been no bill of sale from him to you?

A. The last part of last year,—about October or November.

Q. That is, after his bankruptcy?      A. Yes.

Q. Now, the shed at the time of its purchase was located at the same place of business?

A. Oh, yes.

Q. Do you know from whom it was purchased? If you don't know, we have the bill of sale here.

A. No, I don't remember.

Q. Do you know, Mrs. Scarbrough, that under

(Testimony of Mrs. Mary Scarbrough.)

date of May 1, 1953 a lease of the Southern Pacific property on which this shed is located, was made by the Southern Pacific to your husband, doing business as Ship Shape Packing Co.?      A. Yes.

Q. Now, your Answer alleges that \$400.00 in rent was collected for the year 1953 by you. Is that right?

A. Yes.

Q. What was the arrangement as to the amount of rent that was to be paid by your husband for his use of this shed as far as you are concerned?

A. Well, I don't remember exactly what it was supposed to cover, length of time, or how to be paid. I just remember that they gave me \$400.00 in rent.

Q. Do you know for what period of time that \$400.00 was supposed to cover?

A. No; I know their ledger shows they owed me more rent.

Q. I presume the ledger is here?      A. Yes.

Q. Your Answer also alleges that you expended \$755.86 in connection with the property in reliance of the belief that you [5] owned it. What are the items comprising the \$755.00?

A. On July 17th, 1956 I spent \$195.25 for insurance; on May 15th, 1956 I paid the Southern Pacific Railroad \$120.00; on June 4th, 1956 I paid Peterson and Traulsen \$52.23; on May 23rd, 1956 I paid H. A. Hyde & Co. \$16.18, on which \$6.25 only went for weed killer for around the shed; on June 20th, 1956 I paid \$9.80 to Hansen Lumber Co. for lumber or supplies; on June 29th, 1956 I made a check to H. A. Hyde & Co. for \$12.36, of which



(Testimony of Mrs. Mary Scarbrough.)

\$4.83 only went for—I suppose weed-killer for the shed. On July 10th, 1956 I paid Harrison's Color Corner \$7.23 for paint; on April 20th, 1956 I paid Harrison's Color Corner \$9.34 for a paint brush for the shed; on April 27th, 1956 I paid Hansen Lumber Co. \$154.42 for either glass or lumber for the shed; on April 28th, 1956 I paid Anthony Greco \$12.00 for labor he did around the shed; on May 8th, 1956 I paid Goodman Lumber Co. \$90.95, and I had previously given them \$20.00 on account of some linoleum tile for the shed office floor.

Q. Is the total payment \$110.95?

A. Yes; \$90.95 plus \$20.00.

On April 11th, 1956 I paid H. A. Hyde & Co. \$53.56 for spray for the shed, and on July 16th, 1956 I paid to W. E. Scarbrough \$20.00 and he was in turn to give this money to Frank Cox for labor he did in hauling away trash from the shed.

Q. I haven't added it, but is the total \$755.00 Mrs. Scarbrough?

A. Yes.

Mr. Shapro: I have no further questions of this witness. Is there anything she wants to testify to on her own behalf? [6]

The Court: Mrs. Scarbrough, Mr. Shapro has concluded his examination of the questions he desired to ask you. Now, he is asking you whether you desire to volunteer any statements on your own behalf?

Mrs. Scarbrough: Well, I have Mr. Timmins,—he is the accountant,—and of course I could say I saw in the general ledger—



(Testimony of Mrs. Mary Scarbrough.)

Q. The general ledger would show——

A. Well, I paid that \$5,000.00 for the shed,—I gave them the money for that.

The Court: That is all. Thank you very much.

### WARREN ELWOOD SCARBROUGH

Being duly sworn by the Court, testified on behalf of the Trustee as follows:

#### Direct Examination

Q. (By the Court): Your name is Warren Elwood Scarbrough?      A. Yes.

Q. And you are the Bankrupt in these proceedings?      A. Yes, sir.

Q. (By Mr. Shapro): Mr. Scarbrough, I show you a document called Bill of Sale, which is dated May 5, 1953 from Salinas Valley Ice Company, in favor of W. E. Scarbrough, and ask you if, after having examined it, that is the Bill of Sale you received after you procured the sum of \$5,000.00 for the tomato shed that we are talking about?

A. Correct, sir.

Mr. Shapro: We will offer the Bill of Sale, your Honor, as Trustee's Exhibit No. 1.

The Court: No. 1,—on the Order to Show Cause.

Q. (By Mr. Shapro): Now, Mr. Scarbrough, was the \$5,000.00 paid in one lump sum to the sellers?      A. Yes, sir.

Q. And whose check was this?

A. The check of Ship Shape Company,—\$5,000.00 to the Salinas Valley Ice Company.

(Testimony of Warren Elwood Scarbrough.)

Q. Dated when? A. July 20, 1953.

Q. And was Ship Shape at that time a partnership, or was it your own business?

A. A partnership.

Q. A partnership consisting of you and Mr. Gildersleeve? A. Correct.

Q. That partnership was subsequently dissolved, the assets being acquired by you, and the obligations being assumed by you; correct?

A. That is correct.

Q. Now, when did you receive,—when I say “you” I am referring to Ship Shape—the \$1,000.00 concerning which Mrs. Scarbrough has testified?

A. When did we receive that?

Q. Yes. If you don't know of your own knowledge—— A. I don't know the date.

Q. We will get it from Mr. Timmins later. Do you know when Ship Shape received the \$4,000.00?

A. No, sir.

Q. You do know it was received in those two sums? A. Yes.

Q. Do you know to whom the checks for the four thousand and the one thousand dollars were made payable to?

A. They were made payable,—no, I can't say for sure.

Q. Mrs. Scarbrough, do you happen to have those two checks with you?

Mrs. Scarbrough: No, I don't. The \$4,000.00 check is a [8] Bank of America cashier's check, and

(Testimony of Warren Elwood Scarbrough.)

they wouldn't look it up—wouldn't give it to me; they checked it.

Q. Mr. Scarbrough, it is a fact that those two checks, one for \$4,000.00 and one for \$1,000.00, whether cashier's checks or your wife's checks, were deposited in the bank account of Ship Shape Company?

A. That is correct, and given to the company.

Q. And neither you nor the company executed a bill of sale or any other instrument in writing purporting to convey title to this shed to Mrs. Scarbrough? A. No, never did.

Q. Now, Mrs. Scarbrough made some mention of the reason for the delay in delivering the bill of sale, referring to the fact that it is dated May 5th and you didn't pay the money until July and didn't receive the bill of sale until December?

A. Correct.

Q. What was the reason?

A. Mrs. Myers,—the widow of Ralph Myers,—was in Europe on a vacation; the sale was agreed upon and it was handled by Mr. Matthews of the Union Ice Company, and we had to wait until her return.

Q. The Trustee's copy of the bill of sale indicates the signatures of Ivy Myers and Ivan Thomas Myers, and is dated December 23, 1953. Are you familiar with the books of account of the Ship Shape Company?

A. No, I am not familiar with the bookkeeping.

Q. You have had no experience in accounting

(Testimony of Warren Elwood Scarbrough.)

matters? A. Oh, no. [9]

Mr. Shapro: Then, your Honor, I have no further questions of Mr. Scarbrough, and if Mrs. Scarbrough has any cross examination——

The Court: Mrs. Scarbrough, you heard Mr. Scarbrough's answers to the questions asked by Mr. Shapro. In addition to the questions you have just heard, is there any question you wish to ask Mr. Scarbrough with reference to this transaction concerning you; any particular point that you wish to bring out?

Mrs. Scarbrough: Well, I could bring out the point about not receiving the bill of sale from them—and it seems in a way so ridiculous, the way they were handling it. But on the other hand, I wish to say I advanced the Ship Shape Company on February 26th, 1953 \$10,000.00; I received from them nothing in writing to show I ever gave them that money,—it was just in the books. Then on April 11th, 1955 I advanced \$6,049.55 to them for U. S. Treasury bonds, and I have the withdrawals—I have the bank receipts on those, but I received nothing from them in writing to indicate I paid them other than what is in the books. On February 24th, 1956 I advanced and paid for them to the California Department of Employment \$2,190.76. I have received nothing from Ship Shape to indicate I had made the payment except how it was handled in the books.

Mr. Shapro: For the sake of the record I am going to object to all the last testimony on the

(Testimony of Warren Elwood Scarbrough.)  
ground that it is incompetent, irrelevant and immaterial. I don't believe it is [10] material because the irregularity of the transactions between the parties has no legal bearing, but for the record I object to it.

Mr. Shapro: I see you have here, Mrs. Scarbrough, Mr. Timmins, an accountant employed by you——

A. No, I met Mr. Timmins today for the first time; I had never met him before.

Q. Now, if you have some evidence you want to bring out from him as your witness I suggest you do so, because, subject to our right to cross-examine, the Trustee will close his case.

The Court: Mrs. Scarbrough, that means that on behalf of the Trustee, Mr. Shapro has completed his case, as far as the Trustee is concerned. If you desire to call anyone as your witness, you may.

Mrs. Scarbrough: Yes, I wish to call Mr. Timmins.

### LOUIS TIMMINS

being duly sworn by the Court, testified on behalf of the Respondent as follows:

#### Direct Examination

Q. (By The Court): What is your full name?

A. Louis Timmins.

Q. Mr. Timmins, what is your occupation?

A. I am a public accountant.

Q. Did you have some connection with either



(Testimony of Louis Timmins.)

Mr. or Mrs. Scarbrough, or the Ship Shape Packing Company?

A. I was retained by the Ship Shape Packing Company as accountant at the time the partnership was first formed. I performed [11] that service for them for several years, it may be two or three years.

Q. Can you tell me when you terminated your connection with either Mr. Scarbrough or Ship Shape Packing Company?

A. I believe it would be approximately—the books would show.

Q. Well, you can look at the books.

A. It would be at the close of their fiscal year, March 31, 1954, after completing the tax return for that period there was no longer——

Q. Since that time you have had nothing to do with the books?      A. That is true.

The Court: Mrs. Scarbrough?

Q. (By Mrs. Scarbrough): Well, I would like Mr. Timmins, inasmuch as he handled it at the time, to explain how the transaction was handled in the books,—where it shows in the books that the shed is mine; where it shows in the ledger that they paid rent, and where they have a journal entry or something—as I say, I am not familiar with the books—showing that rent was due to me, and the books as they were originally.

The Court: This transaction originally commenced with this item——

Mr. Shapro: May 1, 1953.

(Testimony of Louis Timmins.)

Q. (By The Court): Mr. Timmins, will you examine the books and tell us what this original entry shows with reference to the transaction of Mrs. Scarbrough and Mr. Scarbrough,—this one controversy here with reference to the shed? [12]

Mr. Shapro: You will have to go back to March, I am sorry,—I said “May.” Please don’t refer to anything else but the books in giving testimony.

Mr. Timmins: I am sorry. I wrote that letter myself. On April 16, 1953, \$4,000.00 was received in a deposit made that day at the bank, which was credited to an account set up as loan payable to Mary Scarbrough.

Q. April 16, 1953, \$4,000.00?

A. That’s right. On July 20, 1953 a check was issued to the Salinas Valley Ice Company for \$5,000.00, and this check was posted as a payment for the tomato shed which is in question, which was—

Mrs. Scarbrough: Mr. Timmins—

Mr. Shapro: Excuse me, you will have to let him testify—

Mr. Timmins: —that was in full payment. On November 27, 1953 there was a further deposit—or included in that deposit was \$1,000.00 which was described as “Received from Mary Scarbrough to apply on the tomato shed”.

Q. That was in November? A. November.

Q. Would you look at the cash deposits on or about March 21, 1953 and see if you have a thousand-dollar deposit?

(Testimony of Louis Timmins.)

A. There is no such deposit.

Q. There was evidence of one here, this last time. Do you have the deposits with you, Mr. Scarbrough?

Mr. Scarbrough: No, sir.

Q. You had them here the last time?

Mr. Scarbrough: Oh, yes, they are in the car, it will take [13] me but a second to get them; they are in a box.

Mr. Timmins: Do you want me to wait?

The Court: Are there some other transactions reflected in the books of the Ship Shape Company?

Mr. Timmins: Yes, one more transaction which will complete it.

The Court: Fine.

Mr. Timmins: On November 27th again there was a book entry made in which the amount of the deposit of April 16th, 1953 which was credited to a loan payable account was reversed and taken out of the loan payable.

Q. This is a journal entry?

A. Similar to a journal entry; it was made in the book here, but it is similar.

Q. November 27th, 1953?

A. November 27th, 1953—that is equivalent to a journal entry, in which \$4,000.00 was transferred out of the loan account and entered as a credit to the tomato shed account, and the explanation given on that was that the balance of the money advanced by Mary Scarbrough applied in liquidation of the loan from her; it was the intention——

(Testimony of Louis Timmins.)

Mr. Shapro: "intention", sir—I object; it is what the books show.

Q. Now, other than the so-called journal entry, what other entry in the books was made of the thousand-dollar deposit on November 27, 1953?

A. Outside of the book, you asked?

Q. Outside of the entry you just read. In other words, you [14] testified that the cash record shows \$1,000.00 received from Mary Scarbrough on November 27th?

A. That is true.

Q. And the journal entry shows that the \$1,000.00 was to apply on the tomato shed account of \$4,000.00?

A. That is true.

Q. Was there any other entry made concerning the \$1,000.00 of November 27th?

A. I am sure that there was none.

Q. Then between April 16th, 1953 and November 27th, 1953 the \$4,000.00 was carried on the books of the Ship Shape Company as a loan from Mary Scarbrough?

A. That is true.

Q. Can you tell from the books whether at all times between April 16th and November 27th, 1953 the bank account was in excess of \$4,000.00?

A. I can tell,—it would take a little time to do it.

Q. I am afraid we are going to have to find out.

A. Because the books of the company were not closed out at the end of each month—in this particular type of bookkeeping we tabulate all checks, the total checks we have to deposit as of that date, and then subtract.

(Testimony of Louis Timmins.)

Q. Can you look at any particular place between those dates of April 16th and November 27th and see whether or not there was any such total, and give us a balance which, if any, is less than \$4,000.00 at any time during that period?

A. Well, from a quick look at the books I can find that there was one place right at the very beginning of that place where the bank balance was less than \$4,000.00.

Q. The date of that, sir?

A. April 29th, 1953. [15]

Q. That is all I want to know on that score at the moment. Now, will you look at the deposit slips, Mr. Timmins, for Ship Shape Packing Company for that date—about March 21, 1953?

A. I have a date here that is close to that date.

Q. You don't have any, do you, here?

A. I don't have any on March 21st,—there were deposits close to that date.

Q. Let me look: There was one that Mr. Scarbrough had which showed a deposit of \$1,000.00 on that date. The reason I am going into that is that he testified the thousand dollars was paid in March, not November.

A. There is '52; you can go on from that.

Q. Let's see the November 27th deposit slip?

A. '53?

Q. Yes.

A. There was at one time two deposit books being used. Are these all of them, Mr. Scarbrough?

Mr. Shapro: My recollection is, Mr. Scarbrough,



(Testimony of Louis Timmins.)

that when you were here before, in January, you had duplicates on white paper, not on yellow.

Mr. Scarbrough: These are the only records Ship Shape ever had; they were in yellow.

Q. They were in yellow, were they?

Mr. Scarbrough: Yes.

Mr. Timmins: It is my recollection, when I began looking up information to write the letter I wrote, that there was information which I was unable to find. Now these are deposits—on this side (indicating). [16]

Q. (By Mr. Shapro): Let's go to November.

A. November 27th—the 21st will be the other way, of course; this would indicate that there were no deposits in the month of March, other than March 24th, 25th, and 31st.

Q. That's true. Then, your Honor, may I ask Mr. Scarbrough a question?

The Court: Yes, certainly.

Q. (By Mr. Shapro): Mr. Scarbrough, when did you receive the thousand dollars as distinguished from the \$4,000.00 from Mrs. Scarbrough, on this tomato shed?

A. I don't recall. Do you have that in the records?

Mr. Shapro: That's just the point; the witness has testified that the thousand dollars was received on November 27th the books show; Mrs. Scarbrough testified it was April 21st; her Answer says March 21st, and you both testified on January 4th, 1957 that it was on March 21st.

(Testimony of Louis Timmins.)

Q. Do you have an account there, Mr. Timmins, for Mr. Scarbrough? A. Yes.

Q. Is this the only account of Mr. Scarbrough in these books?

A. I believe it was, unless there was a withdrawal—but I don't believe there was such.

Q. Now, where is the Mary Scarbrough account?

A. Mary Scarbrough; I see there was set up two pages; this is the one originally set up. That shows the four-thousand-dollar payment by her.

Mr. Shapro: May the record show that the general ledger, [17] under loans payable, Mary Scarbrough, shows under date of November 27, 1953 the following entry: Liquidation loan tomato shed purchase; the post reference is cr5—which, (addressing the witness) was the cash record?

A. That's true.

Q. \$4,000.00 is a debit to the loan payable account; right? A. Yes.

Q. That is the result of the journal entry that you identified previously?

A. That is true; I was going to show you the entry,—here it is, right here.

Q. Will you show where the account was credited with the four thousand—?

A. Right here. (Indicating on book.)

Mr. Shapro: The same ledger sheet, under date of April 16, 1953, and with the posting reference "cl" shows a credit to that account of \$4,000.00. I have no further questions.

The Court: Mrs. Scarbrough, do you have anything?

(Testimony of Louis Timmins.)

Mrs. Scarbrough: I haven't anything if I don't recall how I gave it to him; I know I gave the one thousand on March 21st—I found this check—I don't know if I gave it in cash or how, but I gave it to him in March; how it was credited on the books, or when it was credited on the books, that I don't know; but on March 21st I gave him a thousand, and four thousand was in April; then I never questioned what they did with it other than that the shed was purchased for me, and so they could use it they were to pay me rent. And Mr. Timmins—Will you look up in the records where they owed me rent, and where they made reference to the fact that that shed was mine?

Mr. Shapro: I will have to ask to strike the last part as the conclusion of the Respondent.

The Court: So ordered. The question she asked was: What do the books show with respect to rent paid on the shed?

Mrs. Scarbrough: I found it: "10/31/55".

Mr. Timmins: This part of the ledger was subsequent to the time, as you can see from the handwriting.

Q. (By Mr. Shapro): You didn't make the entries that you are now referring to?

A. This wasn't made by me, but——

Mrs. Scarbrough: What——

(Mrs. Scarbrough admonished by the Court.)

Q. (By The Court): Mr. Timmins, were you going to make a statement with reference to what the books show on the rental?

(Testimony of Louis Timmins.)

A. Yes. Subsequent to this I found a place where the rentals were paid, apparently, by cash.

Q. (By Mr. Shapro): That was the four hundred dollar item?

A. The four hundred dollar item—I would have to look that up, but I am certain it was.

Q. From your records there is no indication of where or what period it was paid to? A. No.

Q. Will you find in this book which Mrs. Scarbrough has called to your attention—and before you do so, what is the book?

A. This is the general journal; page 12.

Q. The date?

A. The date it is marked here is "10/31/55 as of April '55" which means correcting entries on page 12 of the general journal there is an entry which debits interests expenses [19] \$666.70 and debits rent \$1500.00, and credits Mary Scarbrough with \$2,166.70, the sum of those two amounts.

Q. Will you look at the Mary Scarbrough account and see whether she received that in cash or whether it was merely a credit to her loan account?

A. That amount of \$2,166.70 was a credit to her loan account.

Mr. Shapro: That is all.

Q. (By Mrs. Scarbrough): Then there is another entry, 12/31/55 J1; it said——

Mr. Timmins: This has nothing to do with rent.

Q. (By Mrs. Scarbrough): Yes, there is one that has to do with rent there.



(Testimony of Louis Timmins.)

A. On December 31, 1955, recorded in the general journal—there is no page number, but it follows two pages after Page No. 14—there is an entry which debits rents \$750.00 and debits interests \$283.34, and credits Mary Scarbrough \$1033.34 with the explanation: “To set up balance of shed; rental at \$250.00 and interest.”

Q. Now, look at Mary Scarbrough’s account and tell us whether that was paid to her in cash or credited?

A. \$1033.34 was credited to her loan account.

Q. Mr. Timmins, will you look at the accompanying check stub 2385 and see the reference that is made there?

A. Check No. 2385 dated 7/20/53 in the amount of \$5,000.00 payable to Salinas Valley Ice Co., Ltd., and the explanation is—“To purchase tomato shed on West Lake Street”, and in parenthesis “Lou”—that is referring to me—“Please check with Elwood on this as to the actual ownership”—end of [20] parenthesis.

Mr. Shapro: Anything else, Mrs. Scarbrough?

Mrs. Scarbrough: That is all I had found out. Do you know of anything else, Mr. Timmins?

Mr. Timmins: I know of nothing as far as rental payments, because all this took place after the time I had been retained. As far as entries regarding the purchase of the shed and as to the ownership of the shed, all of those entries have been covered by me in my former comments.



(Testimony of Louis Timmins.)

Mr. Beadle: I would like to suggest this; it might help a lot to show the depreciation, if there was any depreciation of the shed taken by the partnership.

Mr. Shapro: I can't see the materiality of it.

Mr. Beadle: If it was their shed you would expect them to take some depreciation.

Mr. Shapro: I can't see where it would be helpful.

The Court: As far as the Court is concerned the matter is submitted, unless some of the parties have something else.

Mr. Shapro: We are always at a disadvantage when counsel doesn't appear,—and I think it would be fairest to all persons concerned to submit the matter in this way—Mrs. Scarbrough is not, shall we say, trained in the law at least—suppose I write your Honor a letter and point out the Trustee's views; and then your Honor could grant Mrs. Scarbrough such time as is necessary to submit a contrary argument.

Mrs. Scarbrough: May I ask Mr. Timmins while he is here [21] if at any time the Ship Shape Packing Company took that shed as their own personal property while they had it on the books; did they take it for their own, or did you just hold it for me till it would be transferred into my name?

Mr. Timmins: The record on the check stubs made no allusion to who owned the shed,—as it says in the book notation to check with Mr. Scarbrough as to the actual ownership; and it wasn't until a

(Testimony of Louis Timmins.)

later date, namely, November 27th, that through information which I had gained through Mr. Scarbrough or his employees, that on the basis of that information we made this entry, which we believed, and we do believe to be a correct entry; we would not have made it otherwise, of course.

Q. And that credits the shed to me—that shows me as the owner of the shed?

Mr. Shapro: I object to that “owner of the shed.”

A. May I answer it this way: The record shows that the money which had been advanced by you and credited to a certain account, namely, the loan account, was later used for the purchasing of that shed.

Mr. Shapro: May I ask one question?

The Court: Well, the Court is aware, I think, of the fact that the \$4,000.00 wasn't in there all the time. Mr. Shapro, if I give you fifteen days——?

Mr. Shapro: Ten days will be all right.

The Court: And Mrs. Scarbrough, you will receive a [22] copy of the letter that Mr. Shapro sends to the Court, and then if you need legal advice you contact someone, and have a reply written to me within ten days after you receive a copy of Mr. Shapro's letter. Submitted 10 and 10. Let the record show that the Court has the Exhibits in the Scarbrough matter. [23]

[Endorsed]: Filed May 1, 1957. Bernard J. Abrott, Referee in Bankruptcy.

BANKRUPT'S EXHIBIT No. 1

Vol. 886, Page 139

JOINT TENANCY DEED

This Indenture, made the fourteenth day of August, one thousand nine hundred and fifty-two, between W. E. Scarbrough, the party of the first part, and Warren E. Scarbrough and Mary Scarbrough, the parties of the second part,

Witnesseth: That the said party of the first part, in consideration of the sum of Ten and no/100 dollars, lawful money of the United States of America, to him in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, and sell unto the said parties of the second part, in joint tenancy and to the survivor of them, and to the heirs and assigns of such survivor forever, all that certain lot, piece or parcel of land situate in the City of Watsonville, County of Santa Cruz, State of California, and bounded and described as follows, to wit:

Being Lot 18, as the same is shown upon the map entitled "Amended Map of W. H. Weeks Subdivision of a part of the City of Watsonville," filed for record in the Office of the County Recorder of said Santa Cruz County February 23, 1905, in Map Book 15, at page 2.

Together with the tenements, hereditaments, and appurtenances thereunto belonging or appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof.

To Have and to Hold the said premises, together with the appurtenances, unto the said parties of the second part, as joint tenants, and not as tenants in common, with right of survivorship, and to the heirs and assigns of such survivor forever.

In Witness Whereof the said party of the first part, has executed this conveyance the day and year first above written.

/s/ W. E. SCARBROUGH.

State of California

County of Monterey—ss.

On this 27th day of August in the year of our Lord one thousand nine hundred and fifty-two, before me, Geo. D. McMillan, a Notary Public in and for the said County of Monterey, State of California, residing therein, duly commissioned and sworn, personally appeared W. E. Scarbrough, known to me to be the person described in and whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In Witness Whereof I have hereunto set my hand and affixed my official seal in said County of Monterey the day and year in this certificate first above written.

[Seal]      /s/ GEO. D. McMILLAN,  
Notary Public in and for the County of Monterey,  
State of California. My commission expires  
May 9, 1956.

Beadle Sep. 25, 8:25 a.m., 1952., Vol. 886, Page 139, Official Records Santa Cruz County. Lela E. Swasey, Recorder.

Admitted in Evidence March 22, 1957.

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BANKRUPT'S EXHIBIT No. 2

DECLARATION OF HOMESTEAD BY  
HUSBAND

Know All Men by These Presents: That I, Warren E. Scarbrough, do hereby declare that I am the head of the family; that I am married, and the name of my wife is Mary Scarbrough; that my family consists of my said wife and two minor children, Susan Scarbrough and Frank Scarbrough.

That I am, at the time of making this declaration, actually residing, with my family, on the premises hereinafter described, and that I claim said premises as a homestead.

The premises so claimed by me are the real property situated in the County of Santa Cruz, State of California, described as follows:

Being Lot 18, as the same is shown upon the map entitled "Amended Map of W. H. Weeks Subdivision of a part of the City of Watsonville", filed for record in the Office of the County Recorder of said Santa Cruz County February 23, 1905, in Map Book 15, at page 2.

Together with the dwelling-house thereon, and its appurtenances.



That I estimate the actual cash value of said premises to be \$23,000.

That no former declaration of homestead has been made.

In Witness Whereof, I have hereunto set my hand this 27th day of August 1952.

/s/ WARREN E. SCARBROUGH.

Warren E. Scarbrough.

State of California

County of Monterey—ss.

On this 27th day of August 1952, before me, the undersigned, a Notary Public in and for the County of Monterey, State of California, personally appeared Warren E. Scarbrough, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] /s/ GEO. D. McMILLAN,

Notary Public in and for the County of Monterey,  
State of California. My commission expires  
May 9, 1956.

12000—Recorded at request of Philander Brooks Beadle Sep. 25, 8:27 a.m., 1952, Vol. 886, Page 141, Official Records Santa Cruz County. Lela Swasey, Recorder.

Admitted in Evidence March 22, 1957.

BANKRUPT'S EXHIBIT No. 3

GRANT DEED

We, J. J. Crosetti and W. E. Scarbrough (also known as Warren E. Scarbrough), doing business under the firm name and style of J. J. Crosetti Company, a partnership, J. J. Crosetti, individually, and Theresa M. Crosetti, his wife, W. E. Scarbrough, individually, and Mary Scarbrough, his wife, grant to W. E. Scarbrough all that real property situated in the City of Watsonville, County of Santa Cruz, State of California, described as follows:

Being Lot 18, as the same is shown upon the map entitled "Amended Map of W. H. Weeks Subdivision of a part of the City of Watsonville", filed for record in the Office of the County Recorder of said Santa Cruz County February 23, 1905, in Map Book 15, at page 2.

[Marginal Note: No taxable consideration.]

Witness our hands this 12th day of April, 1952.

J. J. CROSETTI COMPANY,  
A Partnership,

/s/ By J. J. CROSETTI  
J. J. Crosetti

And /s/ W. E. SCARBROUGH  
W. E. Scarbrough

/s/ MARY SCARBROUGH  
Mary Scarbrough

/s/ J. J. CROSETTI  
J. J. Crosetti

/s/ W. E. SCARBROUGH

W. E. Scarbrough

/s/ THERESA M. CROSETTI

Theresa M. Crosetti

State of California

County of Santa Cruz—ss.

On this 12th day of April in the year one thousand nine hundred and fifty-two before me, Irene Davis, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared J. J. Crosetti, individually, and Theresa M. Crosetti, his wife, W. E. Scarbrough (also known as Warren E. Scarbrough), individually, and Mary Scarbrough, his wife, known to me to be the persons described in and whose names are subscribed to the within instrument and acknowledged to me that they executed the same.

In Witness Whereof I have hereunto set my hand and affixed my official Seal at my office in said County the day and year in this certificate first above written.

[Seal] /s/ IRENE DAVIS,  
Notary Public in and for said County and State.

My commission expires June 10, 1955.

State of California

County of Santa Cruz—ss.

On this 12th day of April in the year one thousand nine hundred and fifty-two before me, Irene Davis, a Notary Public in and for the County of Santa Cruz, State of California, residing therein, duly commissioned and sworn, personally appeared

J. J. Crosetti and W. E. Scarbrough (also known as Warren E. Scarbrough), known to me to be the partners of the partnership that executed the within instrument, and acknowledged to me that such partnership executed the same.

In Witness Whereof I have hereunto set my hand and affixed my official seal in the County of Santa Cruz the day and year in this certificate first above written.

[Seal]      /s/ IRENE DAVIS,

Notary Public in and for the County of Santa Cruz,  
State of California. My commission expires  
June 10, 1955.

4623 — Recorded at request of Penniman Title Co. (Santa Cruz County) Apr. 17, 2:40 p.m., 1952, Vol. 865, Page 55, Official Records Santa Cruz County. Lela E. Swasey, Recorder.

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[Title of District Court and Cause.]

HEARING ON MOTION TO DISMISS  
TRUSTEE'S PETITION

Before Hon. Bernard J. Abrott, Referee in Bankruptcy, in Room A, Civil Auditorium, on July 12, 1957.

Appearances: Arthur P. Shapro, Esq., of the law firm of Shapro & Rothschild, 155 Montgomery Street, San Francisco 4, Calif., for the Trustee. Loyd W. Carter, Esq., of the law firm of Carter,

Terreo & O'Connell, 1095 Market Street, San Francisco 3, Calif., for the Respondent, Mary Scarbrough.

San Jose, California, July 12, 1957. 3:00 o'clock p.m.

The Court: In the Matter of Warren E. Scarbrough; Motion to Dismiss Trustee's Petition.

Mr. Shapro: Before the Motion is presented I would like to suggest to the Court and Counsel that the record should be supplemented in one respect. In support of his Motion Mr. Carter has filed an Affidavit admitting the fact that the packing shed was destroyed by fire on May 1st, 1957. However, in his Motion he has said nothing about it, and therefore the record, in my opinion, is defective in that it does not indicate that the shed in question was insured against fire by the Trustee. I am going to ask Mr. Carter either to stipulate to that, or I will offer evidence on the subject because I want the record to show that the subject matter of this petition was covered by fire insurance amounting to \$6,000.00. Now in addition, if Mr. Carter wants to show some other type of insurance I have no objection.

Mr. Carter: I might state,—this is preliminary to the Motion,—as your Honor would know from looking at the Notice of Motion that it is based on the fact that under the present state of the pleadings the question would become moot because Ship Shape asks for an order to sell free and clear of liens; it wouldn't be a case of controversy because



the Court would [1]\* lose jurisdiction at the property having been destroyed. Now I shouldn't question at all that the Court would have jurisdiction if this insurance policy is a part of the record; it has proceeds, and I think it is clear that its proceeds follow the property. The Court could properly determine if we have any rights in the insurance policy; I have no objection to that.

Mr. Shapro: That is all I wanted. All I wanted to do was to show that at the time of the fire there was in force, covering the specific property against which action is sought to be dismissed in this Motion—namely, the packing shed—a policy of fire insurance issued April 1, 1957, for a term of three years commencing April 1, 1957, and the amount of the coverage was \$6,000.00. Now this particular property, (I mean the shed) was destroyed by fire on May 7th, wasn't it?

Mr. Carter: On or about that.

Mr. Shapro: Actually, it was during the period that this policy was in force; in other words, your date is off six or seven days. In any event, for the purposes of the record, there was in force a fire insurance policy issued at the instance of the Trustee, and I am not offering that for any other purpose than to show that it was issued in the name of the Trustee—not on the merits at all.

Mr. Carter: If it is offered as evidence that the Trustee thought he was the owner of it—— [2]

Mr. Shapro: No.

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Page numbers appearing at top of page of Reporter's Transcript of Record.

Mr. Carter: Is it offered for the purpose of amending the pleadings?

Mr. Shapro: No; it is offered solely in opposition to your Motion. You say the shed was destroyed by fire, which I admit. I also want to show that it was insured at that time for the estate.

Mr. Carter: For a limited purpose, your Honor.

(Followed by discussion off the record.)

The Court: But you do accept the statement that the premises were insured by the Trustee, without prejudice to your client's rights?

Mr. Carter: For the record: Just to say the property was insured by the Trustee—I don't think I have any objection. We will stipulate then, even though the record fails to set it forth, that the premises were destroyed by fire.

Mr. Shapro: Yes.

Mr. Carter: Also, summarily for turn-over proceedings, that both parties had the building insured.

The Court: Without prejudice to your client's rights.

Mr. Carter: Yes.

Mr. Shapro: I think I can save both your Honor's time and Mr. Carter's, by making this observation: I don't quarrel in any way with the authorities that Mr. Carter has cited in support of his Motion; I merely want to point out to Your Honor [3] that, if it becomes moot, it is not a substantial part of the controversy, and it is the Court's duty to dismiss the petition. I concede that to be the law and, therefore, to present a new motion would

not be necessary. I merely want to introduce it to show that the subject matter is not moot.

Mr. Carter: I don't think there is any question in the law if it is mooted——

Mr. Shapro: I say it is not moot,—and if you want to argue that it is, if your Honor will examine the Trustee's Petition to Sell the Property Free and Clear of Liens you will find the allegation that this packing shed is an asset of this estate (Page No. 1, Trustee's Petition for Leave to Sell Personal Property Free and Clear of Liens, in the second paragraph, among the assets). And your Honor, by reading the third paragraph on that page, will realize that the Trustee has asserted "that Mary Marie Scarbrough claims an interest in or a lien upon the above described personal property, the exact nature, extent and/or validity of which said claim is unknown to your Petitioner, but which said purported claim of lien or interest therein your Petitioner verily believes and therefore represents to be invalid as against your Petitioner, as such Trustee." Then we ask in the prayer for an Order authorizing the Trustee to sell said personal property free and clear of any lien, claim, right, or interest therein whatsoever in favor of said Mary Marie Scarbrough, [4] and for an Order requiring her to file and propound herein under oath, within such time as this Court may specify, such claim of lien or interest as she may have or assert against the said personal property, and that thereafter due hearing be had to have this Court determine the nature, extent and/or validity of such

claim. Now, Mrs. Scarbrough filed an Answer——

The Court: It was filed February 6th.

Mr. Shapro: Yes, your Honor,—in which she sets forth the fact that she bases her claim—I am reading Paragraph III: “That said lien of this respondent is a first lien upon said personal property”. And in the prayer she prays “for an order finding the validity, extent, and priority of her said lien and directing the sale of said personal property free and clear of all liens and interests and the transfer of her lien to the proceeds thereof, and for such other and further relief as is just”. Now on those issues, your Honor, the case was tried; it was submitted on the memorandums to be filed, but before they were all in—(the last one is in now) but before they were all in, the fire occurred.

Now we take the position, if your Honor please, that the Petition for Leave to Sell is only one of the means, summary means available for a Trustee to have claims to property in the possession of the Bankrupt at the time of the petition determined by the Court. Mrs. Scarbrough claimed a lien or interest, and we asked that she propound it, [5] and that when she did that, that the Court, after due hearing, determine the validity of it. Mrs. Scarbrough did so propound her alleged claim; we tried the case on the issues involved on the theory that it all relates to the property at the time of the petition, which was then in existence,—the subject of her lien, whether it was a valid lien or not; the destruction of the subject matter by fire would



not make this a moot question unless there were no insurance—if there were no insurance I would agree. It is not a question of ownership, because ownership is conceded. It is a question of lien rights. Mrs. Scarbrough said she intended to get title, but confessed she had not; she thought she had a lien because she paid the purchase price, and also spent some money to improve the shed.

Referring only to the pleadings now on that basis, the real issue is whether or not at the time of the filing of this petition Mary Scarbrough had a valid and subsisting lien on this shed. As counsel said a few moments ago, this Court would obviously have the right and the jurisdiction to determine the controversy over the property, namely, the proceeds of the insurance policy covering the property. On that basis, to dismiss the petition as Counsel asks, would not avoid a multiplicity of actions but rather encourage such, because somebody would have to collect the insurance. If we got it, Mr. Carter would have to try the case again on the same basis. [6]

Mr. Carter: But not in this Court.

Mr. Shapro: The answer would be, if this is dismissed and we collect the \$6,000.00 which is obtainable only under this policy, Mr. Carter's client would have to come in here and try again the same thing. There is no lien; that issue is just as alive today as it was a minute before the fire. The shed was destroyed by reason of the fire, and by reason of the fact that there was a fire insurance coverage before the fire occurred, it would be subject to the jurisdiction of this Court.



Mr. Carter: I will stipulate that this Court make an Order that not only the question of a sale free and clear is moot, but that Mrs. Scarbrough has no interest whatsoever in the policy of fire insurance taken out by the Trustee, because the cases clearly hold that an adverse claimant cannot claim an interest against the Trustee's property, because he simply insures his insurable interest. I submit, if I may go back now to try to pick up the argument—and going back to my own motion, primarily there was no apparent question; I concede the record not having made mention of the policy; that the shed in question was in the possession of the Trustee, and that this Court has the exclusive jurisdiction to determine the rights of lien claimants, and the Trustee's rights in that property. However, before the matter was decided, the personal property was destroyed and is now completely out of existence. Now it is not urged that there [7] is any jurisdiction of this Court except that there was certain physical property in the possession of the Trustee.

Mr. Shapro: I disagree; I only wanted to call attention to the fact that Mr. Carter's statement is incorrect because I have stated—and he has stated the same thing—that although the property was destroyed since it was insured by the Trustee, this Court has jurisdiction to determine the same questions in connection with the insurance money that it would, and could have determined in connection with the property,—having in mind, Mr. Carter, that the insurance proceeds follow the property.

Mr. Carter: In this case there is only one issue before the Court, and both parties have asked for the same thing,—that is, that the Court make an order authorizing the Trustee to sell the property free and clear——

Mr. Shapro: No—read the Answer.

Mr. Carter: Mr. Shapro, let me finish completely. Both Mr. Shapro's pleadings and Mrs. Scarbrough's, in propria persona, ask for one thing; that this Court authorize the sale of this property free and clear of liens; both ask for the determination of the validity or right of her lien—she does claim a lien.

The Court: It is difficult to find out whether she claims a lien or——

Mr. Carter: This is the issue: Should the Court make an Order selling this property free and clear of liens, [8] and second, determine to what extent she may have a lien on the proceeds. I submit that when the personal property was destroyed by fire that the Court lost summary jurisdiction,—that there is nothing left for the Court to decide. Now, if there are no proceeds left to the Trustee—if he wishes to throw this out completely and to amend his pleadings to determine that Mr. Scarbrough has no interest in the insurance policy, I will stipulate to that, because I don't think we have any interest in the Trustee's policy; but if he wants to amend his pleadings, first he has to have an Order authorizing him to sell free and clear.

Mr. Shapro: I don't want that; I want the Court to determine—if I may answer now—he says

there are two things we asked for. We asked—both sides asked for an Order; in our case, authorizing and directing the sale of personal property—that is moot——

Mr. Carter: That is moot,—the pleadings as they are now.

Mr. Shapro: Yes, and if one point is moot, the Court can still grant the other through the Order determining the right, title, or interest that Mrs. Scarbrough may claim against the property. She asks the same thing, asks it be determined as a first lien. I think the Trustee is entitled, certainly the Trustee is entitled to have your Honor make a finding on the basis of the evidence before the Court which is now here on Mr. Carter's motion, with her Affidavit, and with the question of insurance here,—make findings that the [9] property may or may not be subject to the lien; that it was destroyed by fire; that there was insurance, and that she either has or has not a lien on the proceeds of the insurance for the satisfaction of her lien.

The Court: Suppose that Mr. Carter stipulates that Mrs. Scarbrough would make no claim whatever on it?

Mr. Shapro: That is not satisfactory. I will tell you why——

Mr. Carter: It is very——

Mr. Shapro: The Judge asked me a question; I am trying to answer. I will withhold then until Counsel finishes his argument.

Mr. Carter: It is very apparent why this is not satisfactory other than the stipulation that we have no interest in his policy because they took it out and there is no insurable interest.

Mr. Shapro: That is why I say it has to be determined upon the pleadings at this moment.

The Court: You are in court now.

Mr. Carter: It is moot for this reason: The Trustee takes out an insurance policy; any question of that policy is between him and his client,—not mine. It may be a question between my client and her company about her insurable interest, but I say the question here is moot because there is no controversy on the question of lien, which is what I object to; he says he just wants the record to show that there was insurance. [10]

Mr. Shapro: That is right.

Mr. Carter: But there is nothing in the evidence, nothing in the pleadings, and nothing in the prayer that would give this Court jurisdiction to determine that we cannot sell it free and clear, and that you have no lien upon the proceeds of the policy—it is simply moot.

Mr. Shapro: It is a maxim of law with which your Honor is very familiar, and one that counsel is just conceding—that the Court may make any judgment and grant any relief which to him appears just and in accordance with the evidence, and there is a prayer in the petition which is sufficient on the question of why I don't want to accept the stipulation. If we stipulate that he claims his client has no interest in this, that is not the



finding which I urge upon your Honor to make—that this property was the property of the bankrupt estate at the time of filing the petition, regardless of whether Mrs. Scarbrough had a lien, because she has insured this property for \$20,000.00. I don't want to be put in the position that, because he claims it, it has to be heard in another court. I would have to go and fight two suits.

Mr. Carter: You have to, anyway, Mr. Shapro.

Mr. Shapro: No, I don't, if I get a finding in this Court today; not on the question of whether this is moot or not, but if I get a finding that I am entitled to try the issues, and that this shed, at the time of filing the petition by the [11] bankrupt was in his possession and thereafter was insured by the Trustee for \$6,000.00, and that Mrs. Scarbrough had no lien or interest in the shed, therefore no interest in the insurance proceeds, I will get \$6,000.00 whether you sue or don't sue.

Mr. Carter: That is just why we are fighting this issue. I dispute what Mr. Shapro says, that there isn't any binding lien upon the property whether it was destroyed by fire or not. Even though it is apparent that both parties have insured, they can only insure their insurable interest. That is why I say I will stipulate that she has no interest in the insurance policy of the Trustee—I don't think I have to do that.

Mr. Shapro: I don't accept the stipulation.

The Court: The Court accepts that. Submitted, gentlemen?

Mr. Carter: There is one statement that Mr.



Shapro made—I hope I got it right; that is, he said his argument is based on the fact that at the date of bankruptcy the personal property did exist and was in the custody and control——

Mr. Shapro: And was owned by the bankrupt estate.

Mr. Carter: ——as of the date of bankruptcy, and as of the date that these proceedings started the property was in existence and was in the possession of this Court, and therefore that this Court can entertain jurisdiction; that subsequently it was destroyed, but the fact of its being destroyed wouldn't in any way affect these proceedings. [12]

The Court: At the beginning of your statement, the first part of the proceedings, I thought you were going to arrive at a point where Mr. Shapro was stipulating to certain facts,—before you started a discussion.

Mr. Shapro: If you want a stipulation that at the time of filing bankruptcy the packing shed was in existence and subject to the jurisdiction of this Court——

Mr. Carter: I just wanted to refer back to Mr. Shapro's statement, and to make the comment that the very destruction of the personal property which is the subject of this proceeding—the fact that it was destroyed leaves your Honor without jurisdiction to make the Order; that is the very basis, and the reason that the Court loses jurisdiction,—the destruction of the property.

Mr. Shapro: It was offered simply to show that it was in existence—it is offered to you.

Mr. Carter: If it is offered as an amendment I will object to that.

Mr. Shapro: I am not asking for any amendment at all.

The Court: Submitted.

[Endorsed]: Filed September 23, 1957. Bernard J. Abrott, Referee in Bankruptcy. [13]

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[Endorsed]: No. 16197. United States Court of Appeals for the Ninth Circuit. J. M. Dungan, Trustee in Bankruptcy of the Estate of Warren Elwood Scarbrough, Bankrupt, Appellant, vs. Warren Elwood Scarbrough, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: September 22, 1958.

Docketed: September 27, 1958.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

United States Court of Appeals  
for the Ninth Circuit

No. 16197

J. M. DUNGAN, Trustee of the Estate of Warren  
Elwood Scarbrough, Bankrupt,

Appellant,

vs.

WARREN ELWOOD SCARBROUGH,

Appellee.

APPELLANT'S CONCISE STATEMENT OF  
POINTS URGED ON APPEAL

Comes now J. M. Dungan, Appellant herein, and in accordance with Rule 17(6) of the Rules and Practice of the U. S. Court of Appeals for the Ninth Circuit, specifies the following as a concise statement of the points on which he intends to rely on this appeal from the Order made and entered by Hon. Louis E. Goodman, Chief Judge, U. S. District Court, for the Northern District of California, on the 30th day of June, 1958, more particularly specified and described in Notice of Appeal heretofore filed with the Clerk of said District Court on the 8th day of August, 1958, as follows:

1. That said Order was not supported by the evidence and is contrary to the law in that:

(a) The District Court in said Order erred in finding that the respondent was entitled to a homestead exemption in the amount of \$12,500.00.

(b) The District Court in said Order erred in holding that said homestead exemption could not be apportion.

(c) The District Court in said Order erred in holding that said Trustee could not sell the respondent bankrupt's undivided one-half interest in the homesteaded property.

Dated: This 3rd day of October, 1958.

SHAPRO & ROTHSCHILD,  
/s/ By ARTHUR P. SHAPRO,  
Attorneys for J. M. Dungan, Trustee of the Estate  
of Warren Elwood Scarbrough, Bankrupt, Ap-  
pellant.

Certificate of Service by Mail Attached.

[Endorsed]: Filed October 6, 1958. Paul P.  
O'Brien, Clerk.

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[Title of Court of Appeals and Cause.]

#### DESIGNATION OF RECORD ON APPEAL

Appellant sets for the following as a designation of all of the record which is material to the consideration of this appeal.

1. The entire transcript of the record, proceedings and evidence as set out in the Referee's Certificate on Petition for Review of Order Authorizing Trustee's sale of real property dated the 6th day of May, 1958.
2. All of the original documents transmitted with

said Referee's Certificate on Petition for Review, less items Nos. 9, 10, 11 and 12.

3. That certain Order Vacating Order of the Referee made and filed on June 30, 1958 by Hon. Louis E. Goodman, Chief Judge, U. S. District Court, Northern District of California.

4. Designation of contents of record on appeal filed in the United States District Court, Northern District of California, on August 8, 1958.

5. Notice of Appeal filed in the U. S. District Court, Northern District of California, on August 8, 1958.

Dated: This 3rd day of October, 1958.

SHAPRO & ROTHSCCHILD,

/s/ By ARTHUR P. SHAPRO,

Attorneys for J. M. Dungan, Trustee of the Estate  
of Warren Elwood Scarbrough, Bankrupt.

Certificate of Service by Mail Attached.

[Endorsed]: Filed October 6, 1958. Paul P.  
O'Brien, Clerk.



[Title of Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF ADDI-  
TIONAL RECORD ON APPEAL

Appellee designates that the following additional documents be included in the record on appeal in the above proceeding:

1. Original documents Nos. 9, 10, 11 and 12 transmitted with the Referee's Certificate on Petition for Review of Order Authorizing Trustee's Sale of Real Property.

Dated: October 9, 1958.

PHILANDER BROOKS BEADLE,  
Attorney for Warren Elwood Scar-  
brough, Appellee.

[Endorsed]: Filed October 13, 1958. Paul P.  
O'Brien, Clerk.

No. 16198 ✓

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United States  
Court of Appeals  
For the Ninth Circuit

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JOHN ANDREAS,

Appellant,

vs.

LILLIAN R. HENDERSON, FRANCES UP-  
CHURCH, JERRY NATHANSON, SAM-  
UEL SONTAG and GEORGE GOLDBERG,

Appellees.

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Transcript of Record

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Appeal from the United States District Court for the  
Southern District of California  
Central Division

FILED

DEC 23 1958

PAUL P. O'BRIEN, CLERK



No. 16198

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United States  
Court of Appeals  
For the Ninth Circuit

---

JOHN ANDREAS,

Appellant,

vs.

LILLIAN R. HENDERSON, FRANCES UP-  
CHURCH, JERRY NATHANSON, SAM-  
UEL SONTAG and GEORGE GOLDBERG,

Appellees.

---

Transcript of Record

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Appeal from the United States District Court for the  
Southern District of California  
Central Division





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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

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Los Angeles 13, California.

For Appellees:

IRL DAVIS BRETT,  
JEROME L. RICHARDSON,  
920 Rowan Building,  
458 South Spring St.,  
Los Angeles 13, California.



In the United States District Court, Southern  
District of California, Central Division

No. 20798-WB

JOHN ANDREAS,

Plaintiff,

vs.

JANE DOE HENDERSON, MARY ROE UP-  
CHURCH, JERRY NATHANSON, SAMUEL  
SANTOG, GEORGE GOLDBERG, DOE ONE  
Through DOE TEN, Inclusive,

Defendants.

COMPLAINT FOR DECLARATORY RELIEF  
AND TO QUIET TITLE

Plaintiff complains of defendants and for cause  
of action, alleges:

Jurisdiction

1. This action arises and these proceedings are  
instituted by plaintiff under Section 5 of the Act  
of January 12, 1891 (26 Stat. 712), to obtain  
redress for the plaintiff and a declaratory judg-  
ment in plaintiff's favor on account of a conveyance  
by the plaintiff, an Agua Caliente Indian, of cer-  
tain lands set apart and allocated under the above  
cited statute during the trust period provided by  
such statute under the provisions of said statute,  
making such conveyance absolutely null and void.



## Venue

2. Defendants reside, transact business and are found [2\*] within the Central Division of the Southern District of California. The alleged violations of law hereinafter described have been and are being carried out in part within the said Central Division of California.

## Parties

3. Plaintiff is now and at all times herein mentioned was an Agua Caliente Indian of the present age of approximately eighty (80) years, with his place of residence in the County of Riverside, State of California, in the area heretofore known as the Palm Springs Reservation.

4. Defendants are now and at all times herein mentioned were residents of the County of Riverside, State of California.

5. The true names or capacities, whether individual, corporate, associate or otherwise, of defendants Doe One through Doe Ten, inclusive, are unknown to plaintiff who therefore sues said defendants by such fictitious names, and will ask leave to amend his complaint to show their true names and capacities when the same have been ascertained. The true names of defendants Jane Doe Henderson and Mary Roe Upchurch are unknown to plaintiff who therefore sues said defendants by such fictitious names and will ask leave to amend

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\*Page numbering appearing at foot of page of original Certified Transcript of Record.

his complaint to show their true names when the same have been ascertained.

6. On or about August 5, 1954, the defendants procured from plaintiff a conveyance (a copy of which is attached hereto marked Exhibit "A") whereby plaintiff purported to convey to the defendants that certain real property situate in the County of Riverside, State of California, and more particularly described as follows, to wit:

"The South One-Half of the Northwest Quarter of the Northwest Quarter of Section 2, Township 4 South, Range 4 East, S. B. B. & M."

which said property is hereinafter referred to as the "subject [3] property."

7. During the year 1954 plaintiff made application to the United States Government for the allocation to him of the subject property and the subject property was thereafter, to wit: on September 14, 1954, allocated to the plaintiff by fee patent dated September 4, 1954, from the United States of America, which said patent was recorded in Book 1671, Page 543, Records of Riverside County, California.

8. The subject property is located on the "Palm Springs Reservation" as said reservation was defined under the Mission Indian Act hereinabove cited as the Act of January 12, 1891 (26 Stat. 712).

9. That an actual controversy exists between plaintiff and defendants and each of them as to whether or not the aforesaid conveyance from plaintiff to defendants is null and void.

10. Plaintiff asserts that the said conveyance is null and void for the reason that it conveys land set apart and allotted under the above cited statute of the United States and that said conveyance was made by plaintiff before the expiration of the trust period provided under the said act.

11. The defendants assert that the said conveyance is valid.

12. That at all times herein mentioned, the defendants Jane Doe Henderson and Mary Roe Upchurch were and are the agents, employees and representatives of the remaining defendants and that all acts of the said defendants Henderson and Upchurch were authorized by all of the remaining defendants and were and are the acts of each and all of the defendants herein.

As a Second, Separate and Complete Cause of Action, Plaintiff Alleges as Follows:

1. The plaintiff is the beneficial owner of the certain [4] real property situate in the County of Riverside, State of California, more particularly described as follows:

“The South One-Half of the Northwest Quarter of the Northwest Quarter of Section 2, Township 4 South, Range 4 East, S. B. B. & M.”

2. That defendants claim some right, title or interest in and to the aforesaid property.

3. That defendants' claims are without right and

defendants have no right, title or interest in said property.

Wherefore, plaintiff prays:

1. That the Court declare the rights of the plaintiff and defendants under the aforesaid conveyance and in and to the subject property.

2. That the Court enter judgment quieting plaintiff's beneficial title in and to the subject property and enjoin defendants from asserting any right, title or interest therein.

3. For such other and further relief as to the Court may seem just and proper.

WARREN E. SLAUGHTER,  
VAUGHAN, BRANDLIN &  
BAGGOT,

By /s/ J. M. BRANDLIN,  
Attorneys for Plaintiff.

Duly Verified.

[Endorsed]: Filed December 5, 1956. [5]

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[Title of District Court and Cause.]

REPLY TO AMENDED COUNTER CLAIM—  
ANSWER TO AMENDED CROSS-CLAIM—  
DEMAND FOR JURY TRIAL UPON  
FACTUAL ISSUES

Comes Now plaintiff John Andreas and answering defendants George E. Goldberg, Jerry Nathanson and Samuel Sontag Amended Counterclaim (so

denominated in its caption) or cross-claim (so denominated in its body) and admits and denies as follows:

1. Admits the allegations of paragraph 2.
2. Denies the allegations of paragraph 3.
3. Answering paragraph 1, admits as follows:

(a) The allegations commencing on page 2, line 15 and ending with the numerals "3360" on page 3, line 3;

(b) The total consideration for the property was to be \$20,000.00 payable \$5,000.00 through escrow and \$15,000.00 by note secured by trust deed payable in annual installments of \$3,000.00 with interest at 5% per year;

(c) Plaintiff executed and acknowledged the grant deed which is attached as Exhibit "A" to the Amended [8] Answer and Counterclaim and placed said deed in escrow;

(d) The allegations commencing on page 3, line 28 and ending with the word "Andreas" on page 4, line 4;

(e) On December 15, 1954, the escrow instructions were modified by the execution by plaintiff, Margaret Andreas and defendants Frances Upchurch and Lillian R. Henderson of the modification appearing on page 4, lines 10 to 15 of the Amended Answer and Counterclaim;

(f) The grant deed hereinabove referred to was recorded on December 21, 1954, in Book 1669, Page



69 of Official Records in the Office of the County Recorder of Riverside County, California;

(g) The allegations commencing on page 4, line 24 and ending on page 5, line 24.

Except as expressly admitted, denies generally and specifically each, every and all of the allegations incorporated therein.

Wherefore, plaintiff prays that defendants George E. Goldberg, Jerry Nathanson and Samuel Sontag take nothing by their amended counterclaim and cross-claim and that judgment be entered in accordance with the prayer of plaintiff's complaint.

WARREN E. SLAUGHTER,  
VAUGHAN, BRANDLIN &  
BAGGOT,

By /s/ THOMAS G. BAGGOT,  
Attorneys for Plaintiff. [9]

Demand for Jury Trial

Plaintiff John Andreas hereby demands a jury trial upon all factual issues herein.

WARREN E. SLAUGHTER,  
VAUGHAN, BRANDLIN &  
BAGGOT,

By /s/ THOMAS G. BAGGOT,  
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 1, 1957.

[Title of District Court and Cause.]

STIPULATION AMENDING COMPLAINT

It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties hereto that the plaintiff's complaint may be and the same hereby is amended nunc pro tunc in the following particulars only:

On page 2, line 27, delete "San Bernardino" and insert in lieu thereof "Riverside."

WARREN E. SLAUGHTER,  
VAUGHAN, BRANDLIN &  
BAGGOT,

By /s/ HENRY B. BRANDLIN,  
Attorneys for Plaintiff.

IRL DAVIS BRETT &  
JEROME B. RICHARDSON,

By /s/ IRL D. BRETT,  
Attorneys for Defendants Lillian R. Henderson,  
Frances Upchurch, Jerry Nathanson, Samuel  
Santog and George Goldberg.

It is so ordered: Date 3-4, 1957.

/s/ WM. M. BYRNE,  
Judge.

[Endorsed]: Filed March 4, 1957. [12]

[Title of District Court and Cause.]

SECOND AMENDED ANSWER  
AND COUNTERCLAIM

Come Now defendants Lillian R. Henderson (sued herein as Jane Doe Henderson), Frances Upchurch (sued herein as Mary Roe Upchurch), Jerry Nathanson, Samuel Santog and George Goldberg and leave of Court being first had and obtained, by way of their Second Amended Answer to plaintiff's complaint, as amended, admit, deny and allege as follows:

Second Amended Answer to First Cause of Action  
(Repetition From Existing Amended Answer)

1. Answering paragraph 5, deny that the true names of the defendants sued as Jane Doe Henderson and Mary Roe Upchurch are unknown to plaintiff and to the contrary allege that plaintiff has at all times known such true names to be Lillian R. Henderson and Frances Upchurch.

2. Answering paragraph 6, deny that defendants or either of them procured from plaintiff the conveyance (a copy of which is attached hereto and marked Exhibit "A") except in the manner as hereinafter alleged. Deny that the lands described on [13] page 2, paragraph 6, lines 29 to 31, inclusive, of the complaint are situated in the County of San Bernardino, State of California, and to the contrary allege that such real property has at all

times been and now is situated in the County of Riverside, State of California.

3. Admit the allegations contained in paragraph 7, except that they deny that the fee patent from the United States of America to plaintiff was dated September 4, 1954, and to the contrary allege that said fee patent was dated, executed and became effective on December 14, 1954.

4. Answering paragraph 8, admit that the real property which is the subject matter of this action is located within the Palm Springs Indian Reservation, except as so admitted, defendants deny the allegations contained in said paragraph 8.

5. Answering paragraph 12, deny each and every allegation therein.

6. Further answering paragraphs 1 to 12, inclusive, in plaintiff's first cause of action, these defendants allege:

That on or about July 29, 1954, plaintiff, John Andreas, whose full true name was and is John Joseph Andreas, was a trust patentee in severalty of the land situated in the County of Riverside, State of California and more particularly described as:

“The South One-Half of the Northwest Quarter of the Northwest Quarter of Section 2, Township 4 South, Range 4 East, S. B. B. & M.”

That such lands had been allotted by the United States of America to said John Joseph Andreas

under the General Allotment Act (24 Stat. 388, et seq., codified as 25 U.S.C., 331 et seq.) and the provisions of the Mission Indian Act (28 Stat. 712 et seq.) and on July 7, 1954, the United States of America by and through the Bureau of Land Management had executed and issued to him a trust patent No. 1145356. [14]

That on or about July 29, 1954, plaintiff, using the name of John Andreas, and Margaret Andreas, his wife, as sellers, and defendants Frances Upchurch, a single woman, and Lillian R. Henderson, a married woman, as buyers, each to the extent of an undivided one-half ( $\frac{1}{2}$ ) interest therein entered into a written escrow with the Palm Springs Branch of the Citizens National Trust and Savings Bank being numbered 3360 by the terms of which it was provided, inter alia, that when and if plaintiff obtained a fee simple patent to said lands from the United States of America, he would sell and convey the same to said buyers for a total consideration of \$20,000.00 of which \$5,000.00 in cash would be paid through escrow and the balance of \$15,000.00 would be represented by a promissory note payable in annual installments of \$3,000.00 or more, together with interest at 5% per annum, secured by a first trust deed upon such real property. That by the terms and provisions of said escrowing instructions the escrow holder became the agent of the plaintiff as seller to receive and hold the deed of conveyance until authorized to deliver the same to the buyers and it was further provided that such delivery be made as follows:



“Close of escrow will be when the fee patent to the seller and the grant deed from seller to the above vestees are recorded.”

That following the execution of such escrow instructions the grant deed, a true copy of which is annexed to the complaint and marked Exhibit “A,” and which these answering defendants by such reference incorporate herein as if herein set out in full, was prepared, signed by the plaintiff on August 2, 1954, acknowledged by the plaintiff before a Notary Public of Riverside County on August 5, 1954, and thereafter delivered by the plaintiff into said escrow and held by said escrow, as his agent, and without any delivery until December 16, 1954.

That on or about July 29, 1954 (the exact date being [15] unknown to these answering defendants) plaintiff made application to the United States Government for a fee patent to said real property and on December 14, 1954, the United States of America by and through the Bureau of Land Management, in accordance with the provisions of the Act of June 17, 1948 (62 Stat. 476) executed and issued a fee simple patent No. 1148458 to said lands and other lands within the Palm Springs Reservation to plaintiff under his full name of John Joseph Andreas, that following notice thereof to plaintiff and to defendants Frances Upchurch and Lillian R. Henderson, the parties to said escrow No. 3360 entered into a written modification and supplement to the original escrow instructions which amended instructions were signed by the plaintiff,

Margaret Andreas, his wife, and the two buyers, Upchurch and Henderson, by the terms of which the escrow was instructed as follows:

“You are hereby authorized and instructed to record the grant deed in your escrow #3360 upon execution of these amended escrow instructions. You are instructed to continue to hold this escrow open until the fee patent is placed in escrow.

“You are further authorized and instructed to pay the sum of \$500.00 from funds you hold in above escrow, to John Andreas, upon execution of these amended escrow instructions.”

That following the execution of said amended escrow instructions, a deed, a true copy of which is annexed to the complaint and marked as Exhibit “A,” was forwarded to Riverside, California, by the Escrow Officer as agent of plaintiff for recording by the County Recorder of said County and was recorded on December 21, 1954, as Document No. 66890 in Book 1669 at page 69 of Official Records in said office.

That immediately following the recording of said deed there was recorded a trust deed upon said real property executed by Frances Upchurch and Lillian R. Henderson as trustors in favor of plaintiff as beneficiary to secure a promissory note in the original principal sum of \$15,000.00. That said trust deed was recorded December 21, 1954, as Document No. 66892 in Book 1669 at page 67 of [67] Official

Records in the Office of the County Recorder of Riverside County. That said promissory note has been paid to plaintiff except to the extent of \$9,-094.33 which sum has been deposited with said Bank by defendants and has been tendered to plaintiff and is available to fully satisfy and discharge the lien of said trustee.

That on October 3, 1956, Frances Upchurch, a single woman, and Lillian R. Henderson, a married woman, executed a grant deed to the above described real property to George E. Goldberg, an unmarried man, that said grant deed was acknowledged by the grantors before a Notary Public of Riverside County and was recorded on October 10, 1956, as document No. 70072 in Book 1983 at page 520 of Official Records in the office of the County Recorder of Riverside County.

That on October 4, 1956, George E. Goldberg, an unmarried man, executed a grant deed to the above-described real property to the extent of a two-thirds ( $\frac{2}{3}$ ) interest therein as follows: To Jerry Nathanson, an unmarried man, an undivided one-third ( $\frac{1}{3}$ ) interest; to Samuel Sontag, an unmarried man, an undivided one-third ( $\frac{1}{3}$ ) interest. That said grant deed was acknowledged by the grantor before a Notary Public of Riverside County and was recorded as instrument No. 70073 on October 10, 1956, in Book 1983 at page 519 of Official Records in the office of the County Recorder of Riverside County.

That since October 4, 1956, defendants Frances Upchurch and Lillian R. Henderson, and each of them, have had no right, title or interest in or to the lands which are the subject matter of this action and they and each of them expressly disclaim any right, title or interest therein.

That since October 4, 1956, the fee simple title to the lands which are the subject matter of this action have been and are vested in defendants George E. Goldberg, an unmarried man, as to an undivided one-third ( $\frac{1}{3}$ ) interest therein; Jerry Nathanson, an [17] unmarried man, as to an undivided one-third ( $\frac{1}{3}$ ) interest therein; and Samuel Sontag, an unmarried man, as to an undivided one-third ( $\frac{1}{3}$ ) interest therein. All subject to the first trust deed aforesaid to secure a promissory note, the unpaid balance of which is \$9,094.33.

7. That all conveyances hereinabove referred to and described were and are valid and conveyed the interest and title described in each of them from the person or persons described therein as sellers to the person or persons described therein as purchasers and that since December 16, 1954 (date of the delivery of the deed, a true copy of which is annexed to the complaint as Exhibit "A"), plaintiff has had no right, title or interest in or to said premises, excepting his rights under the note and trust deed aforesaid.

Second Amended Answer to Second Cause of Action  
(Repetition From Existing Amended Answer)

1. Defendants refer to paragraphs 1-7, inclusive, of their answer to the first cause of action and by such reference replead the same as if herein set out in full.

2. Answering paragraph 1 of the second cause of action, defendants deny each and every allegation therein.

3. Answering paragraphs 2 and 3 of the second cause of action, defendants admit and allege that defendants George E. Goldberg, Jerry Nathanson and Samuel Sontag claim to be and are the owners in fee simple of an undivided one-third ( $\frac{1}{3}$ ) interest each in and to the lands described in paragraph 1 of the second cause of action and further allege that plaintiff has no right, title or interest therein excepting his rights in the first trust deed thereon securing an unpaid balance of \$9,094.33 and no [18] more.

\* \* \*

Cross-Claim

(Repetition From Existing Amended Answer)

1. Come now the defendants George E. Goldberg, Jerry Nathanson and Samuel Sontag and each of them and by way of a cross-claim against plaintiff John Andreas refer to and by such reference re-allege herein as if herein set out in full all of the allegations set forth in paragraphs 6 and 7 of their



answer to plaintiff's first cause of action commencing on page 2, line 17 and ending on page 6, line 14.

2. That plaintiff John Andreas claims some right, title or interest in and to said real property.

3. That the claim of said plaintiff John Andreas is without right and said plaintiff has no right, title or interest therein save and except to the extent of his interest as beneficiary in the trust deed which was recorded on December 21, 1954, as document No. 66892 in Book 1669 at page 67 of Official Records in the Office of the County Recorder of Riverside County and to the extent of securing an unpaid balance of \$9,094.33 upon the promissory note secured by such trustee. [25]

Wherefore Defendants Pray:

1. That the Court declare the rights of plaintiff and of these answering defendants under the instrument of conveyance described and set forth in the complaint and this answer and cross-claim and to the real property described therein.

2. That the Court enter judgment quieting title in person or persons which the Court finds to be entitled thereto, and directing that plaintiff accept and receive full satisfaction of said note and trust deed and that the lien of such trust deed be extinguished of record and that plaintiff John Andreas, also known as John Joseph Andreas, his agents, attorneys, executors, administrators, assigns and successors in interest (other than these answering defendants and cross-claimants) be enjoined

and debarred for all time from asserting any right, title or interest therein.

3. For their costs of suit herein incurred and such other and general relief as to the Court may seem just and proper.

IRL DAVIS BRETT &  
JEROME L. RICHARDSON,

By /s/ IRL D. BRETT,  
Attorneys for Defendants.

#### Statement of Counsel

In view of the fact that by the order made by this Court on September 23, 1957, defendants were permitted to prepare, serve and file this Second Amended Answer and Counterclaim only if they complied with the condition precedent fixed by this Honorable Court that such pleading must repeat verbatim the defenses and cross-claim as set forth in their existing Amended Answer and Counterclaim, which counsel for defendants have [26] hereinabove complied with and in view of the fact that Rule 11 F.R.C.P. provides, in effect, that the signature of counsel is a verification of such pleadings, and in view of the fact that since the filing of said Amended Answer and Counterclaim counsel for defendants has discovered that the unpaid balance of the trust deed upon subject property is \$12,961.18 instead of the sum of \$9,094.33 as originally recited in the Amended Answer and Counterclaim and repeated verbatim herein, counsel for defendants will, at the appropriate time and place request leave to

amend this pleading to comport with the truth as to such unpaid amount.

Dated: September 30, 1957.

IRL DAVIS BRETT &  
JEROME L. RICHARDSON,

By /s/ IRL D. BRETT,  
Attorneys for Defendants.

Certificate of Counsel for Plaintiff Attached.

[Endorsed]: Filed October 4, 1957. [27]

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[Title of District Court and Cause.]

STIPULATION RE PLAINTIFF'S ANSWER  
TO COUNTERCLAIM AND ORDER PUR-  
SUANT TO SAID STIPULATION

It is hereby stipulated by and between plaintiff and defendants Lillian R. Henderson, Frances Upchurch, Jerry Nathanson, Samuel Santog, and George Goldberg, through their respective counsel, the undersigned, that the plaintiff's "Reply to Amended Counterclaim—Answer to Amended Cross-Claim" may be deemed to be plaintiff's Answer to Defendants' Counterclaim (so denominated in its caption) or Cross-Claim (so denominated in its body), set forth on page 13, lines 13 to 31 of said defendants' "Second Amended Answer and Counterclaim."

Dated: October 1, 1957.

WARREN E. SLAUGHTER,  
ROBERT E. SCHLESINGER,  
VAUGHAN, BRANDLIN &  
BAGGOT,

By /s/ THOMAS G. BAGGOT,  
Attorneys for Plaintiff.

JEROME L. RICHARDSON,  
IRL DAVIS BRETT,

By /s/ IRL D. BRETT,  
Attorneys for Defendants. [30]

Order

Pursuant to the above Stipulation, it is so ordered.  
Dated: October 4, 1957.

/s/ WM. M. BYRNE,  
United States District Judge.

[Endorsed]: Filed October 7, 1957. [31]

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[Title of District Court and Cause.]

### STIPULATION AS TO FACTS

Plaintiff and defendants, Lillian R. Henderson, Frances Upchurch, Jerry Nathanson, George E. Goldberg and Samuel Sontag, through their respective counsel, the undersigned, hereby conditionally stipulate that the following facts are true and correct and that the originals of the writings, copies or

photocopies of which are referred to in this stipulation are genuine and that each thereof was duly executed and signed or witnessed by the persons whose names appear thereon as having executed, approved or witnessed the same. The conditions under which this stipulation of facts is executed are as follows:

A. The stipulation and admission of each fact (whether evidenced by a writing or not) is deemed to be admitted as true, subject to the reservation by each of the parties hereto of any and all rights to object to the admission thereof or of any part thereof in evidence in this case upon any ground or grounds excepting that neither of the stipulating parties shall be entitled to controvert [32] the truth of the stipulated fact or that such writing or writings evidencing the same are not genuine and/or were not duly executed, approved or witnessed by the person or persons whose signatures appear thereon.

B. Plaintiff expressly reserves the objections to the facts which are hereafter listed as items Nos. 11 to 21, inclusive, as being incompetent, irrelevant and immaterial to any issues raised by the pleadings in this case and expressly objects to the receipt thereof or any part thereof in evidence and/or to the consideration thereof or any part thereof for any purpose.

C. That each party hereto expressly reserves the right to contend and to prove, if such proof be available and admitted by the court, that any one or



more of the hereinafter recited and stipulated facts (including the writings evidencing the same) is or are but a part of an entire act, declaration, conversation or writing constituting one integrated subject matter as defined by Section 1854 C.C.P.

Expressly subject to the foregoing, the parties hereto stipulate and agree that the following facts are true:

1. Plaintiff is an Indian and a member of the Agua Caliente band of Mission Indians commonly called the Palm Springs band.

2. On July 7, 1954, the United States of America executed and issued to plaintiff a trust patent, being No. 1145356, to the following described real property situated in the County of Riverside, State of California:

The South one-half of the Northwest Quarter of the Northwest Quarter of Section 2, Township 4 South, Range 4 East, S. B. B. & M.

That a true copy of said trust patent is annexed hereto marked as Exhibit P-1 and by such reference, incorporated herein as if herein set out in full. .

3. On July 29, 1954, plaintiff and defendants, Lillian [33] R. Henderson and Frances Upchurch, each signed and executed a writing in the form of written escrow instructions to the Palm Springs branch of Citizens National Trust & Savings Bank of Riverside, which escrow was identified by such

bank as its escrow No. 3360. That a true copy of such writing is identified as Exhibit "A" and is annexed to the Affidavit of Wilma Wilson, dated January 8, 1957, which has heretofore been filed in this case.

4. Defendant Lillian R. Henderson was at all times material herein, and now is, the wife of Benjamin Henderson. Benjamin Henderson is a member of the law firm of Benjamin Henderson and Jerome L. Richardson of Palm Springs, California, who at all times material herein were defendant Jerry Nathanson's attorneys. Jerome L. Richardson is counsel of record for all defendants herein. Defendant Frances Upchurch was at all times material herein, and now is, a legal secretary employed by said firm of Henderson and Richardson.

5. That the photocopy of the grant deed which is annexed to the original complaint and marked as Exhibit "A" is a true and correct copy of the original. That said original was signed by John Andreas on August 2, 1954. That said deed was delivered to the escrow holder in escrow 3360 on August 5, 1954. That said deed was mailed by the escrow holder to Land Title Company of Riverside County in the City of Riverside, California, on December 17, 1954, with directions that it be recorded and said original deed was recorded as document No. 66890 in book 1669 at page 69 of Official Records in the office of the County Recorder of Riverside County on December 21, 1954.

6. That there is annexed hereto and marked as Exhibit P-2 [34] a photocopy of a trust deed from Frances Upchurch and Lillian R. Henderson as trustors to Security Title Insurance Company, a California corporation, as trustee, for John Andreas, a married man, as beneficiary. That said photocopy is a true and correct copy of the original thereof. That the original thereof was signed by Frances Upchurch and Lillian R. Henderson on August 2, 1954, and was acknowledged before Wilma Wilson, a Notary Public for the County of Riverside, California on September 17, 1954. That it was delivered to the escrow holder in escrow No. 3360 on September 17, 1954, and was mailed by said escrow to Land Title Company of Riverside County, in Riverside, California, on December 17, 1954, with instructions to record the same. That it was recorded as instrument No. 66892 in book 1669 at page 67 of Official Records in the Office of the County Recorder of Riverside County on December 21, 1954.

7. That on December 14, 1954, the United States of America executed and issued to plaintiff a fee simple patent being No. 1148458. That the photocopy thereof which is marked Exhibit "A" and is annexed to the affidavit of Jules J. Brasseur dated January 4, 1957, and which was heretofore filed in this action is a true and correct copy of said fee simple patent. That said fee simple patent was deposited in escrow No. 3360 on December 28, 1954, and was mailed on the same day by said escrow to Land Title Company of Riverside County at River-

side, California, with instructions to record the same. That said fee simple patent was recorded in book 1671 at page 544 of Official Records in the office of the County Recorder of Riverside County on December 29, 1954.

8. On December 15, 1954, plaintiff and defendants Lillian R. Henderson and Frances Upchurch each signed amended escrow instructions in escrow No. 3360 which read as follows: [35]

“You are hereby authorized and instructed to record the grant deed in your escrow #3360 upon execution of these amended escrow instructions. You are instructed to continue to hold this escrow open until the fee patent is placed in escrow.

“You are further authorized and instructed to pay the sum of \$500.00 from funds you hold in above escrow, to John Andreas, upon execution of these amended escrow instructions.”

9. On October 3, 1956, Frances Upchurch, a single woman, and Lillian R. Henderson, a married woman, executed a grant deed to the above described real property to George E. Goldberg, an unmarried man. Said grant deed was acknowledged by the grantors before a notary public of Riverside County and was recorded on October 10, 1956, as document No. 70072 in book 1983 at page 520 of Official Records in the office of the County Recorder of Riverside County. That a true photocopy thereof is marked as Exhibit “B” and annexed to the affidavit

of Jules J. Brasseur dated January 4, 1954, which has heretofore been filed in this action.

10. On October 4, 1956, George E. Goldberg, an unmarried man, executed a grant deed to the above described real property to the extent of a two-thirds ( $\frac{2}{3}$ ) interest therein as follows: To Jerry Nathanson, an unmarried man, an undivided one-third ( $\frac{1}{3}$ ) interest; to Samuel Sontag, an unmarried man, an undivided one-third ( $\frac{1}{3}$ ) interest. Said grant deed was acknowledged by the grantor before a notary public in Riverside County and was recorded as instrument No. 70073 on October 10, 1956, in book 1983, page 519 of Official Records in the office of the County Recorder of Riverside County. That a true photocopy thereof is marked as Exhibit "C" and annexed to the affidavit of Jules J. Brasseur dated [36] January 4, 1954, which has heretofore been filed in this action.

12. That on July 19, 1954, plaintiff executed the original application, entitled "Application for a Patent in Fee," consisting of five partially printed, partially typewritten and partially pen and ink inscribed sheets, true copies of which are identified as Exhibit 1, pages 1 to 5, inclusive, and annexed to the affidavit of Jerry Nathanson dated June 10, 1957, which has heretofore been filed in this action.

13. That on July 19, 1954 Ned Mitchell was the District Agent for the Palm Springs Indian Reservation and Mary B. Whitman was a clerk in his office.



14. That on July 19, 1954 said District Agent, Ned Mitchell, completed and executed the original written report [37] entitled "Superintendent's Report on Application for a Patent in Fee," consisting of five partially printed and partially typewritten sheets, true photocopies of which are identified as Exhibit 2, pages 1 to 5 inclusive, and annexed to said affidavit of Jerry Nathanson dated June 10, 1957.

15. That on July 19, 1954 said District Agent, Ned Mitchell, completed and executed the original "Certificate of Appraisement," a true copy of which is identified as Exhibit 4 and annexed to said affidavit of Jerry Nathanson dated June 10, 1957.

16. That at all times between July 7, 1954 and September 4, 1954, Leonard M. Hill was the duly appointed, qualified and acting Area Director of the Sacramento (California) Area Office of the Bureau of Indian Affairs, Department of the Interior and such area included the Palm Springs Indian Reservation. That during the same period of time Henry Harris Jr. was an Assistant Area Director under Mr. Hill.

17. That on September 3, 1954, Mr. Hill, acting in his capacity of Area Director, endorsed his approval upon page 3 of the "Superintendent's Report" made by Mr. Mitchell on July 19, 1954 as it appears on the photocopy of said page 3 of Exhibit 2 as annexed to the affidavit of Jerry Nathanson

dated June 10, 1957. That such endorsement read as follows:

“Approved:

“/s/ LEONARD M. HILL,  
“LEONARD M. HILL,  
“Area Director.”

18. That on September 3, 1954, Mr. Hill, as such Area Director, signed the certificate which is the final paragraph of the certificate of appraisal prepared by Mr. Mitchell and which certificate read as follows:

“I hereby certify that Ned Mitchell was appointed by me to appraise the land above described; that he is well acquainted with the value of lands in the vicinity of the [38] tract above described, and fully competent to make such appraisalment, and that I verily believe the above appraisalment is the true value of the land and the improvements thereon.

Dated 3rd day of September, 1954.

“/s/ LEONARD M. HILL,  
“Area Director  
Superintendent.”

19. That on September 3, 1954 Mr. Hill, as such Area Director, signed the letter addressed to Mr. Edward Woozley, Administrator for Land Management, Department of the Interior, Washington 25,

D. C., a photocopy of a carbon copy of which is identified as Exhibit 3 and annexed to the affidavit of Jerry Nathanson dated June 10, 1957. That a few days after September 3, 1954 plaintiff received a carbon copy of said letter through the United States mail.

20. On March 14, 1955, plaintiff filed a suit against defendant, Jerry Nathanson, as number Indio 367 in the Superior Court of the State of California in and for the County of Riverside, entitled "Andreas v. Nathanson et al.," to collect damages alleged to have been suffered by plaintiff through the sale of subject property defendants, Henderson and Upchurch. Thereafter, on April 15, 1955, and for a valuable consideration, plaintiff dismissed said suit with prejudice. That a true copy of said dismissal is identified as Exhibit "C" is annexed to defendants' proposed second amended and supplemental answer and counter claim which was heretofore lodged with the clerk in this case.

21. On April 20, 1955, plaintiff, his wife, Margaret Andreas, and defendant, Jerry Nathanson, executed, for a valuable consideration a mutual general release from all actions, claims and demands up to April 20, 1955. That a true copy of said mutual general release was annexed and marked as Exhibit "D" to defendants' proposed second amended [39] and supplemental answer and counter claim which was heretofore lodged with the clerk in this case.

Dated: November 13, 1957.

WARREN E. SLAUGHTER,  
VAUGHAN, BRANDLIN &  
BAGGOT,

By /s/ THOMAS G. BAGGOT,  
Attorneys for Plaintiff.

IRL DAVIS BRETT,  
JEROME L. RICHARDSON,

By /s/ IRL D. BRETT,  
Attorneys for Defendants.

/s/ ALBERT G. BERGMAN.

[Endorsed]: Filed November 19, 1957. [40]

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[Title of District Court and Cause.]

### MEMORANDUM OF DECISION

Andreas is an Indian and a member of the Agua Caliente band of Mission Indians commonly called the Palm Springs band. As plaintiff, he seeks to have declared void a deed by which he conveyed certain real property located in Palm Springs to the defendants Henderson and Upchurch.

Federal jurisdiction is invoked under 28 U. S. C. 1331, upon the ground that the controversy arises under the General Allotment Act, 24 Stat. 388, 25 U. S. C. 331, et seq., and the Mission Indian Act of

January 12, 1891, 26 Stat. 712, amended by the Act of August 24, 1954, 68 Stat. 791.

The Mission Indian Act provides that certain reservation lands should be allotted to members of the tribe to be held in trust for a period, and on application of the Indian, to be conveyed to him in fee. Until a patent in fee is issued to the Indian, the land is held in trust by the Government and “\* \* \* if any conveyance shall be made of the lands set apart and allotted \* \* \* or any contract made touching the same” (before the patent in fee is issued), “such conveyance or contract shall be absolutely null and void \* \* \*.” It is this quoted clause with which we are concerned. [43]

On July 7, 1954, the United States of America executed and issued to Andreas a trust patent to the real property which is the subject of this litigation. On July 29, 1954, Andreas and defendants Henderson and Upchurch entered into a written escrow agreement at a Palm Springs bank, whereby plaintiff agreed to sell and the defendants agreed to buy the subject property for \$20,000 payable \$5,000 through escrow and the balance of \$15,000 by promissory note secured by a first deed of trust on the property. Andreas executed a grant deed on August 2, 1954, and on August 5, 1954, deposited it in escrow. The trust deed by Henderson and Upchurch was signed and delivered to the escrow holder on September 17, 1954.

On December 14, 1954, the trust period expired and the United States of America executed and



issued a fee simple patent. On December 15, 1954, Andreas, Henderson and Upchurch signed amended escrow instructions as follows:

“You are hereby authorized and instructed to record the grant deed in your escrow No. 3360 upon execution of these amended escrow instructions. You are instructed to continue to hold this escrow open until the fee patent is placed in escrow.

“You are further authorized and instructed to pay the sum of \$500.00 from funds you hold in above escrow, to John Andreas, upon execution of these amended escrow instructions.”

Thereafter the fee simple patent was deposited in escrow, the documents recorded, and the funds paid to Andreas.

The controlling questions in this case are: Was the conveyance made during the trust period; and if not, is a conveyance which is made after the trust period void because made in accordance with a contract entered into during the trust period?

While title to property placed in escrow does not, as a general rule, pass, at least until the conditions of the [44] escrow have been filled, *Holman v. Toten*, 54 Cal. App. 2d 309, 128 P. 2d 808 (1942); *Blumenthal v. Liebman*, 109 Cal. App. 2d 374, 240 P. 2d 699 (1952); *Todd v. Vestermark*, 145 Cal. App. 2d 374, 302 P. 2d 347 (1956); 18 Cal. Jur. 2d, S. 24, p. 340, the plaintiff contends that under the doctrine of “relation back” title should be deemed

to have passed at the time of the deposit of the deed in escrow and thus title would have passed during the period when the restrictions on alienation still existed.

The doctrine of "relation back" has been used to avoid injustices involved in a strict application of the rule which provides that title to property placed in escrow does not pass until the conditions of the escrow are completed. Thus, under the "relation back" doctrine, the title is treated as relating back to and taking effect at the time of the deposit of the deed in escrow. 117 A. L. R. 69; 18 Cal. Jur. 2d S. 27, p. 347. This fiction of "relation back" has been employed in many California escrow situations. See *McDonald v. Huff*, 77 Cal. 279, 19 P. 499 (1888); *Marr v. Rhodes*, 131 Cal. 267, 63 P. 364 (1900); *Hawi Mill & Plantation Co. v. Finn*, 82 Cal. App. 255, 255 P. 543 (1927); *Deming v. Smith*, 19 Cal. App. 2d 683, 66 P. 2d 454 (1937). The use of the doctrine in these cases was for the purpose of giving effect to the intention of the parties and to avoid hardship. In the absence of such circumstances, the doctrine should not be applied. *Vierneisal v. Rhode Island Ins. Co.*, 77 Cal. App. 2d 229, 175 P. 2d 63 (1946).

If the doctrine of "relation back" were applied here, we would have the anomalous situation of the court making a fictional finding that title passed at an earlier date for the purpose of holding that in fact no title passed at all because of the violation of the restrictions on alienation imposed by [45]

the Mission Indian Act. Nor is there any basis for invoking the doctrine on the theory of avoiding hardship. If the plaintiff prevails in this case he will retain both the land and the consideration he received for the sale of the land. See *Heckman v. United States*, 224 U. S. 413 (1911); *Oates v. Freeman*, 57 Okla. 449, 157 P. 74 (1915). To employ the fictional doctrine in order to grant the plaintiff a windfall at the expense of the defendants would be to use it for a purpose contrary to that for which it is intended.

Andreas contends that a contract void because made during the trust period so taints a conveyance made in pursuance of such a contract that such conveyance is void, even though the conveyance itself was made after the fee patent was obtained by the grantor. Plaintiff relies on a line of Oklahoma decisions which hold that a conveyance made after the expiration of the trust period, pursuant to an agreement to convey made during the trust period, is void. *Carter v. Prairie Oil & Gas Co.*, 58 Okla. 365, 160 P. 319 (1915), Appeal Dismissed in 244 U. S. 646 (1916); *Williams v. Diesel*, 65 Okla. 163, 165 P. 187 (1917); *Nixon v. Woodcock*, 64 Okla. 86, 166 P. 183 (1917); *Folsom v. Jones*, 68 Okla. 233, 173 P. 649 (1918); *Adams v. Hoskins*, 96 Okla. 239, 221 P. 728 (1923); *Kelley v. New State Land Co.*, 115 Okla. 170, 245 P. 988 (1925), cert. den. in 273 U. S. 720. These decisions do not involve a construction of the General Allotment Act or the Mission Indian Act. They are based upon the wording of Section 19 of the Act of April 26, 1906,

34 Stat. 144, which was a special statute applicable only to certain named of the Five Civilized Tribes. *Heckman v. United States*, *supra*. That Act provided: [46]

“Every deed executed before or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void.”

Thus, it can be seen that the cases on which plaintiff relies were compelled to the conclusions reached by the express wording of the statute involved. The Act of May 27, 1908, 35 Stat. 312 repealed the Act of April 26, 1906, and the Oklahoma decisions take cognizance of the elimination of the compelling language. See *McKeever v. Carter*, 53 Okla. 360, 157 P. 56 (1916).

Unlike the Act of April 26, 1906, 34 Stat. 144, the Mission Indian Act, which is the controlling statute in the instant case, does not provide that a conveyance made after the removal of restrictions, if made in pursuance of an agreement entered into before the removal of such restrictions, is void. Section 5 of the Mission Indian Act provides that “if conveyance \* \* \* or any contract” is made during the trust period, “such conveyance or contract shall be absolutely null and void.” In both clauses the words “contract” and “conveyance” are expressed in the disjunctive. If Congress had intended to void a conveyance made after the removal of restrictions, if made in pursuance of a contract entered into before the removal of restrictions, it



would have done so by the use of clear language as it did in the Act of April 26, 1906, 34 Stat. 144. Congress chose not to do so.

While it is true that the purpose of the restrictions on alienation imposed by the Indian acts is to protect the Indian from the greed of the white man and from his own improvidence, *Starr v. Long Jim*, 227 U. S. 613 (1913); *Mullen v. Simmons*, 234 U. S. 192 (1914); *Flournoy Live-Stock & Real-Estate Co.*, 65 F. 30 (C. C. A. 8th 1894), Appeal Dismissed in 163 U. S. 686; *Choctaw Lumber Co. v. Coleman*, 56 Okla. 377, 156 P. 222 (1916), it is, of course, necessary that the statute in fact have [47] been violated before the conveyance should be held void. In the instant case the contract to sell was void under the statute because made during the period of restrictions. Being void, the contract was incapable of being ratified and specific performance could not have been compelled by the defendants. *Spector v. Pete*, 157 A. C. A. 461 (1958); *McKeever v. Carter*, *supra*. But this does not mean that after he received the fee patent and the trust period ended, the Indian could not then make a valid conveyance of the allotted lands. Nor would it make any difference if the land were conveyed on the identical terms contained in the void contract. To hold otherwise would be to penalize the Indian, which was not the intention of Congress.

This case does not involve the enforcement or ratification of a contract void or otherwise. On December 15, 1954, after the expiration of the trust period, Andreas signed amended escrow instructions



authorizing the delivery and recordation of the grant deed he had previously signed. He was free to convey the property at this time, and though he was not required to, he chose to deposit the fee patent, to order the delivery and recordation of the deed, and to accept the consideration. The conveyance, made after the removal of restrictions, was valid.

Counsel for defendant is directed to prepare, serve and lodge findings and judgment in accordance with local Rule 7.

Dated: March 21, 1958.

/s/ WM. M. BYRNE,

United States District Judge.

[Endorsed]: Filed March 21, 1958. [48]

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In the United States District Court, Southern  
District of California, Central Division

No. 20798—WB

JOHN ANDREAS,

Plaintiff,

vs.

JANE DOE HENDERSON, et al.,

Defendants.

FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND JUDGMENT

This cause came on regularly to be heard in courtroom No. 3 of the above-entitled Court, second floor

of the United States Courthouse and Post Office Building, 312 North Spring Street, Los Angeles 12, California, on the 19th and 20th days of November, 1957, the Honorable William M. Byrne, United States District Judge, presiding, and was tried without a jury, a jury trial having been expressly waived by all parties in open court; Warren E. Slaughter, Robert A. Schlesinger and Vaughan, Brandlin & Baggot (Thomas G. Baggot, Esq., appearing at and conducting the trial) appeared as counsel for plaintiff, and Irl Davis Brett, Jerome L. Richardson and Albert G. Bergman (Messrs. Brett and Bergman appearing at and conducting the trial) appeared as counsel for defendants Lillian R. Henderson (sued herein as Jane Doe Henderson), Frances Upchurch (sued herein as Mary Doe Upchurch), Jerry Nathanson, Samuel Sontag [49] (whose appearance was pleaded as Santog but whose true name is Sontag), and George Goldberg;

Whereupon, evidence, oral and documentary, was offered and received in evidence, and the case being closed, the cause was submitted to the Court for consideration and decision;

Now, therefore, the Court finds the facts to be as follows:

### Findings of Fact

#### I.

Between July 7, 1954, and the date of trial, plaintiff, John Andreas, was and still is an Indian and a member of the Agua Caliente Band of Mission

Indians which then was and still is commonly called the Palm Springs Band of Mission Indians.

## II.

On July 7, 1954, the United States of America executed and issued to plaintiff a trust patent being No. 1145356, to the following-described real property situated in the County of Riverside, State of California:

The South one-half of the Northwest quarter of the Northwest quarter of Section 2, Township 4 South, Range 4 East, S.B.B. & M.

This property is hereinafter called "subject property." That a true copy thereof was received in evidence as Exhibit 1.

## III.

On July 29, 1954, plaintiff, John Andreas, and defendants, Lillian R. Henderson and Frances Upchurch, entered into a written escrow agreement, a true copy of which was received in evidence as Exhibit 2, and a true copy of which is annexed hereto marked as Exhibit A and by such reference incorporated herein as if herein set out in full. [50]

## IV.

Plaintiff signed a grant deed of subject property to said Henderson and Upchurch on August 2, 1954, acknowledged the same before a Riverside County (California) notary public on August 5, 1954, and deposited said deed in such escrow on

August 5, 1954. A true copy of said grant deed was received in evidence as Exhibit 3.

#### V.

On August 2, 1954, defendants, Henderson and Upchurch, executed a promissory note for \$15,000.00 in favor of plaintiff which was payable in installments as provided for in said escrow instructions, and on the same date they signed a first trust deed upon subject property to secure payment of said note. On September 17, 1954, said defendants acknowledged said trust deed before a Riverside County (California) notary public and deposited said note and trust deed in such escrow. A true copy of said first trust deed was received in evidence as Exhibit 4.

#### VI.

Said escrow instructions included express provisions for the deposit by plaintiff therein and for the recording by and out of such escrow of a fee simple patent from the United States of America to plaintiff of subject property when such fee patent was issued to and received by plaintiff and said escrow instructions further expressly provided that "close of escrow will be when the fee simple patent to the seller (who was the plaintiff) and the grant deed from seller to the above vestees (who were Henderson and Upchurch) are recorded."

#### VII.

The escrow holder retained in its possession in such escrow until December 15, 1954 (or a later

date), all moneys and [51] writings deposited with it.

### VIII.

On December 14, 1954, the United States of America executed and issued to plaintiff a fee simple patent to subject property, a true copy of which was received in evidence as Exhibit 5.

### IX.

On December 15, 1954, plaintiff and defendants, Henderson and Upchurch, signed and delivered to the escrow holder amended escrow instructions reading:

“You are hereby authorized and instructed to record the grant deed in your escrow No. 3360 upon execution of these amended escrow instructions. You are instructed to continue to hold this escrow open until the fee patent is placed in escrow.

“You are further authorized and instructed to pay the sum of \$500.00 from funds you hold in above escrow, to John Andreas, upon execution of these amended escrow instructions.”

### X.

After such amended escrow instructions were signed and delivered and before this suit was filed, the fee simple patent to plaintiff was deposited in the escrow, the patent, deed and trust deed were recorded in the office of the County Recorder of



Riverside County, California, as follows: The patent on December 29, 1954, in Book 1671 at page 543 of Official Records, the deed on December 21, 1954, in Book 1669 at page 69 of Official Records and the trust deed on December 21, 1954, in Book 1669 at page 27 of Official Records; the note was delivered to plaintiff and the funds constituting the purchase price were paid, or tendered in full payment, to plaintiff.

### XI.

After the escrow was closed and before this suit was filed, the title to subject property was conveyed by mesne conveyances of record so that at the date when this suit was filed such title was vested in undivided one-third interests in [52] defendants, Jerry Nathanson, Samuel Sontag and George E. Goldberg, subject to an unaccepted but tendered balance of \$12,961.18, secured by said first trust deed which is still held and owned by plaintiff, and defendants, Lillian R. Henderson and Frances Upchurch, had no right, title or interest in subject property and have each expressly disclaimed any interest therein.

### XII.

Prior to the filing of this suit and at all times thereafter, defendants have tendered the full unpaid balance of said note secured by said trust deed to plaintiff conditioned only that he cause said note to be satisfied and discharged and said trust deed to be extinguished through a reconveyance by the trustee named therein and have continued such tender in effect by depositing it as such tender to

plaintiff with such escrow bank but plaintiff has continuously refused such tender and has refused to surrender up such note and to direct the trustee named in such trust deed to reconvey subject property.

### XIII.

Federal jurisdiction is invoked under 28 U.S.C. 1331, upon the ground that the controversy arises under the General Allotment Act, 24 Stat. 388, 25 U.S.C. 331, et seq., and the Mission Indian Act of January 12, 1891, 26 Stat. 712, amended by the Act of August 24, 1954, 68 Stat. 791.

The Mission Indian Act provides that certain reservation lands (which includes subject property) should be allotted to members of the tribe to be held in trust for a period, and on application of the Indian, to be conveyed to him in fee. Until a patent in fee is issued to the Indian, the land is held in trust by the Government and “\* \* \* if any conveyance shall be made of the lands set apart and allotted \* \* \* or any contract made touching [53] the same” (before the patent in fee is issued), “such conveyance or contract shall be absolutely null and void \* \* \*” It is this quoted clause with which we are concerned.

### XIV.

Other issues are raised by the pleadings but such issues have become irrelevant and immaterial in view of the conclusions which the Court is making based upon the foregoing findings and, for such reason, it is unnecessary for the Court to make find-

ings thereon or to determine the legal issues thereby raised and the Court makes no findings thereon and draws no conclusions with respect thereto.

And from the foregoing findings of fact, the Court draws and makes the following conclusions of law and order for judgment:

### Conclusions of Law

#### I.

This Court has jurisdiction of the parties and of this cause pursuant to Title 28, U.S.C., Section 1331.

#### II.

The issuance of the fee simple patent by the United States of America to John Andreas of subject property on December 14, 1954, terminated the trust restrictions thereon and invested said patentee with unrestricted fee simple title to such property as of said date.

#### III.

Neither Section 5 of the General Allotment Act (Title 25, U.S.C., Section 348) nor Section 5 of the Mission Indian Act (26 Stat. 712 as amended by the Act of August 24, 1954; 68 Stat. 791) prohibited or made void plaintiff's conveyance to Henderson and Upchurch. [54]

#### IV.

The doctrine of "relation back" is inapplicable to the facts of this case.

V.

There was no conveyance of subject property by plaintiff until after the fee patent had been issued to him.

VI.

The voluntary delivery of the grant deed of subject property from John Andreas to Lillian R. Henderson and Frances Upchurch pursuant to the express written consent and direction of John Andreas, made after the trust restrictions were removed, was valid and binding upon all parties hereto.

VII.

Defendants, Jerry Nathanson, Samuel Sontag and George E. Goldberg, are entitled to judgment:

(1) That plaintiff take nothing by his complaint, as amended, except (as has at all times been conceded by them and has been and is now tendered by them to plaintiff) the right to collect and receive the balance of the purchase price in the sum of \$12,961.18, without interest, conditioned upon and coincident with the delivery to said defendants of the promissory note secured by the first trust deed and his executed request to the trustee named in such trust deed for a full reconveyance thereof.

(2) That the full fee simple title to subject property is invested and quieted in undivided one-third interests, each, in Jerry Nathanson, Samuel Sontag and George E. Goldberg and plaintiff, his attorneys, agents, heirs, administrators, executors, successors and assigns (other than Lillian R. Henderson and

Frances Upchurch and all who deraign title through and under them) be enjoined and [55] debarred forever from asserting any right, title or interest therein.

(3) That defendants have and recover their costs and disbursements as provided by law.

Dated: May 15, 1958.

/s/ WM. M. BYRNE,  
United States District Judge.

### JUDGMENT

In accordance with the foregoing findings of fact and conclusions of law, it is Ordered, Adjudged and Decreed:

#### I.

This Court has jurisdiction of the parties and of this cause pursuant to Title 28 U.S.C., Section 1331.

#### II.

That the subject matter of this action, which is hereinafter referred to as "subject property," is that certain real property situated in the County of Riverside, State of California, described as:

The South one-half of the Northwest quarter of the Northwest quarter of Section 2, Township 4 South, Range 4 East, S.B.B. & M. [56]

#### III.

The issuance of the fee simple patent by the United States of America to John Andreas of sub-



ject property on December 14, 1954, terminated the trust restrictions thereon and invested said patentee with unrestricted fee simple title to such property as of said date.

#### IV.

Neither Section 5 of the General Allotment Act (Title 25 U.S.C., Section 348) nor Section 5 of the Mission Indian Act (26 Stat. 712 as amended by the Act of August 24, 1954; 68 Stat. 791) prohibited or made void plaintiff's conveyance to Lillian R. Henderson and Frances Upchurch.

#### V.

The doctrine of "relation back" is inapplicable to the facts of this case.

#### VI.

There was no conveyance of subject property by plaintiff until after the fee patent had been issued to him.

#### VII.

The voluntary delivery of the grant deed of subject property from John Andreas to Lillian R. Henderson and Frances Upchurch pursuant to the express written consent and direction of John Andreas, made after the trust restrictions were removed, was valid and binding upon all parties to this action.

#### VIII.

That plaintiff take nothing by his complaint, as amended, except (as has at all times been conceded

by them and has been and [57] is now tendered by them to plaintiff) the right to collect and receive the balance of the purchase price in the sum of \$12,961.18, without interest, conditioned upon and coincident with the delivery to said defendants, Nathanson, Sontag and Goldberg, of the promissory note secured by the first trust deed and his executed request to the trustee named in such trust deed for a full reconveyance thereof.

### IX.

That the full fee simple title to subject property is invested and quieted in undivided one-third interests, each, in Jerry Nathanson, Samuel Sontag and George E. Goldberg, and plaintiff, his attorneys, agents, heirs, administrators, executors, successors and assigns (other than Lillian R. Henderson and Frances Upchurch and all who deraign title through and under them) be, and they are hereby, enjoined and debarred forever from asserting any right, title or interest therein.

### X.

That defendants, Lillian R. Henderson and Frances Upchurch, had no right, title or interest in or to the property described in paragraph II hereof.

### XI.

That defendants, Jerry Nathanson, Samuel Sontag and [58] George E. Goldberg, have and recover their costs and disbursements as provided by law as against plaintiff, John Andreas, taxed at \$106.72.

Dated: May 15, 1958.

/s/ WM. M. BYRNE,

United States District Judge.

Approved as to form under Rule 7.

WARREN E. SLAUGHTER, and  
ROBERT A. SCHLESINGER,  
VAUGHAN, BRANDLIN &  
BAGGOT,

By /s/ THOMAS G. BAGGOT,  
Attorneys for Plaintiff.

Presented by:

/s/ IRL D. BRETT,  
Attorney for Defendants.

[Endorsed]: Filed May 15, 1958.

Entered May 16, 1958. [59]

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[Title of District Court and Cause.]

# NOTICE OF MOTION FOR NEW TRIAL

To Defendants Lillian R. Henderson (sued herein as Jane Doe Henderson), Frances Upchurch (sued herein as Mary Doe Upchurch), Jerry Nathanson, Samuel Sontag and George Goldberg, and Their Attorneys, Irl Davis Brett and Jerome L. Richardson:

Please Take Notice that plaintiff will, in the courtroom of the Honorable William M. Byrne,

United States District Judge for the Southern District of California, at the United States Courthouse, Los Angeles, California, move the court for its order vacating and setting aside the decision and judgment entered herein on May 16, 1958, and granting to plaintiff a new trial, and for such other orders as may be meet and just on the following grounds:

1. Insufficiency of the evidence to justify the decision.

2. Errors of law occurring at the trial. [67]

3. The decision and judgment are against law.

The errors in law relied upon are the following:

1. The court erred in deciding that the conveyance was not made during the trust period.

2. The court erred in deciding that the conveyance was valid even though made pursuant to a void contract entered into during the trust period.

3. The court erred in deciding that the title did not pass as of the date of the contract, i.e., the escrow instructions.

4. The court erred in deciding, in effect, that the amendment to the escrow instructions dated December 15, 1954, did not relate to the original contract, i.e., the escrow instructions.

The evidence is insufficient to justify the decision in the following particulars:

1. Insufficiency of the evidence to justify the

findings and decision that the conveyance was not made during the trust period.

2. Insufficiency of the evidence to justify the findings and decision that conveyance was valid even though made pursuant to a void contract entered into during the trust period.

3. Insufficiency of the evidence to justify the findings and decision that title would not pass as of the date of the contract, i.e., the escrow instructions.

4. Insufficiency of the evidence to justify the findings and decision, in effect, that the amendment to the escrow instructions dated December 15, 1954 did not relate to the original contract, i.e., the escrow instructions.

Said motion will be made and based on the pleadings and papers on file herein, and upon the minutes of the court.

Dated: May 21, 1958.

WARREN E. SLAUGHTER,  
VAUGHAN, BRANDLIN &  
BAGGOT,

By /s/ THOMAS G. BAGGOT,  
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 22, 1958. [68]



[Title of District Court and Cause.]

## ORDER DENYING MOTION FOR NEW TRIAL

Plaintiff John Andreas having timely filed a Notice of Motion for New Trial and said cause and motion having been set to be heard and having come on for hearing in the courtroom of and before the Honorable William M. Byrne, United States District Judge for the Southern District of California, at the United States Courthouse, Los Angeles, California, on Thursday, June 26, 1958, at the hour of 9:45 a.m., Thomas G. Baggot, Esq., appearing and submitting oral argument in behalf of said moving plaintiff, and Irl Davis Brett, Esq., having appeared for defendants in response to and in opposition to such motion and the cause having been argued and submitted to the Court for consideration and decision

It Is Ordered that plaintiff's Motion for New Trial be, and it is hereby denied. [71]

Dated: June 21, 1958.

/s/ WM. M. BYRNE,  
United States District Judge.

Approved as to form under Rule 7.

WARREN E. SLAUGHTER, and  
ROBERT A. SCHLESINGER,  
VAUGHAN, BRANDLIN &  
BAGGOT,

By /s/ THOMAS G. BAGGOT,  
Attorneys for Plaintiff.

Presented by:

/s/ IRL D. BRETT,  
Attorney for Defendants.

[Endorsed]: Filed June 26, 1958. [72]

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

To the Defendants Lillian R. Henderson (sued herein as Jane Doe Henderson), Frances Upchurch (sued herein as Mary Doe Upchurch), Jerry Nathanson, Samuel Sontag and George Goldberg, and Their Attorneys, Irl Davis Brett and Jerome L. Richardson:

Notice Is Hereby Given that plaintiff John Andreas hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered in this action on May 16, 1958.

Dated: July 22, 1958.

WARREN E. SLAUGHTER,  
VAUGHAN, BRANDLIN &  
BAGGOT,

By /s/ THOMAS G. BAGGOT,  
Attorneys for Plaintiff and  
Appellant John Andreas.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 24, 1958. [73]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING  
RECORD AND DOCKETING APPEAL

On the ex parte motion of plaintiff and upon the Affidavit of Thomas G. Baggot, one of counsel for plaintiff, and the court being fully advised,

It Is Hereby Ordered that the time for filing record on appeal herein with the United States Court of Appeals for the Ninth Circuit and for docketing therein the appeal taken by plaintiff by Notice of Appeal filed July 24, 1958, is extended to October 1, 1958, pursuant to Rule 73(g) of the Federal Rules of Civil Procedure.

Dated: Aug. 25, 1958.

/s/ BEN HARRISON,  
United States District Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 25, 1958. [87]

In the United States District Court, Southern  
District of California, Central Division

No. 20,798—WB—Civil

JOHN ANDREAS,

Plaintiff,

vs.

JANE DOE HENDERSON, et al.,

Defendants.

Honorable Wm. M. Byrne, Judge Presiding.

REPORTER'S TRANSCRIPT  
OF PROCEEDINGS

Wednesday, November 20, 1957

Appearances:

For the Plaintiff:

MESSRS. VAUGHAN, BRANDLIN &  
BAGGOT, by  
THOMAS BAGGOT, ESQ.

For the Defendants:

IRL D. BRETT, ESQ.,  
ALBERT G. BERGMAN, ESQ.

HENRY HARRIS, JR.

called as a witness on behalf of the defendants,  
being first sworn, was examined and testified as fol-  
lows:

The Clerk: Give us your full name, sir.

The Witness: Henry Harris, Jr.

(Testimony of Henry Harris, Jr.)

Direct Examination

By Mr. Brett:

Q. Mr. Harris, where do you reside at this time?

A. Berkeley, California.

Q. Were you employed by the Bureau of Indian Affairs during the year 1954?

A. During part of the year, yes, sir.

Q. And during what part of the year?

A. I terminated my services with them in November of 1954.

Q. Prior to that termination what was your position with the Department?

A. I was the assistant area director for the State of California.

Q. And was that true during the entire portion of the year 1954 up to the date of the termination of your connection with it? [1\*]

A. Yes, sir.

Q. Now, was the Palm Springs Indian Reservation within the jurisdiction of that area?

A. It was.

Q. Who at that time was the area director?

A. Mr. Leonard M. Hill.

Q. Do you know whether he still is area director?

A. He is.

Q. Who at that time was the local or district agent in charge of the Palm Springs Indian Reservation?

A. Mr. Ned Mitchell.

Q. Where were your headquarters?

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\*Page numbering appearing at top of page of original Reporter's Transcript of Record.



(Testimony of Henry Harris, Jr.)

A. Sacramento, California.

Q. In the course of your official duties were you called upon and did you go to the Palm Springs reservation upon occasion? A. Very often.

Q. Now, did you become acquainted with the plaintiff John Joseph Andreas in the course of your duties? A. Yes.

Q. Would you state about when?

A. I came with the Bureau of Indian Service in February of 1951 and knew him from then on.

Q. At that time was he employed in any capacity?

A. He worked as a toll gate man in the [2] canyon.

\* \* \*

Q. Now, do you know Mr. Jerry Nathanson?

A. I do.

\* \* \*

Q. Did you also become acquainted with the wife of John Joseph Andreas, Margaret [3] Andreas? A. I did.

\* \* \*

Q. Now, Mr. Harris, during the year 1954 and up until November of that year when you terminated your Government service were there any printed official regulations by the Secretary of the Interior with respect to the manner of handling the request of an Indian allottee who owned trust patented lands to become able to sell those lands to a non-Indian?

(Testimony of Henry Harris, Jr.)

A. None of which I had knowledge, no, sir.

Q. Was it a part of your official duties to attend to and make recommendations on such matters?

A. It was.

Q. Before July of 1954 had you done so in a number of occasions?      A. Yes, sir. [4]

\* \* \*

Q. (By Mr. Brett): Were there regulations that were oral that you were to follow in such [5] instances?

A. We had very definite methods which we did follow in order to do that.

Q. And they were methods that were approved and required by the Area Director?

A. That's right. [6]

\* \* \*

Q. (By Mr. Brett): Did you have any directions from Area Director Hill as to what you were to do if an Indian member of the Palm Springs Band, having restricted allotted lands, expressed the desire to sell those lands? [8]

\* \* \*

The Witness: Yes.

Q. (By Mr. Brett): Would you state what those directions were?

\* \* \*

The Witness: My directions in those instances where I had any part were substantially these: We were to ascertain whether the Indian desired to sell; in other words, that this was something he

(Testimony of Henry Harris, Jr.)

wished and that he was not being pressured, that it was his own personal desire.

We were to review the advantageousness of the sale. We were to go over the plans of the Indian to see how he wished to use the funds and what his future plans would be. And any other pertinent factors which might apply in the individual case, each case being different; then I would give to Mr. Hill my recommendation. We would go over the matter.

May I add something to that? I did not at any time take the applications. That was not my function. That was the District Agent's function. Nor did I make a written report, as such.

I acted purely in the capacity of adviser and recommender as an intermediary position between the Agent and the Director.

Q. In other words, you were in between the District Agent and the Area Director?

A. That's right. [9]

Q. You were the man who ultimately presented it to Mr. Hill for approval or disapproval?

A. Yes, in those instances where I was concerned. There were instances where I was not involved.

\* \* \*

Q. (By Mr. Brett): I direct your attention, Mr. Harris, to a photocopy of an application for patent in fee which is dated July 19, 1954, and signed by John J. Andreas, and is witnessed by Mary B. Whittman and Ned Mitchell.

(Testimony of Henry Harris, Jr.)

Have you seen the original of that document?

A. Yes, I have.

Q. And did you see it before it was ultimately presented to Mr. Hill?      A. Oh, yes.

Q. Now, having in mind the date of that document, which is July 19, 1954, did you receive any information with respect to the desire of John Andreas to sell any of his trust patented lands?

A. Yes.

Q. And from whom did you receive that information?

\* \* \*

The Witness: For some time preceding this Mrs. Andreas [10] conversations with me regarding their financial problems. There were four minor children in the home and they had very little income.

\* \* \*

The Court: He said Mrs. Andreas.

\* \* \*

Q. (By Mr. Brett): Did you receive that information from any other person?

A. Mr. Andreas.

Q. What did you do after you received that information? Tell us who you saw. [11]

\* \* \*

The Witness: As I understood the question, your Honor, I believe Mr. Brett asked me whether I had conversations with them indicating their desire in this matter. Isn't that correct? Wasn't that the substance of your question?

(Testimony of Henry Harris, Jr.)

Mr. Brett: That's right, in selling their trust patented land.

The Witness: And my answer was that I had talked to Mr. Andreas on that and Mrs. Andreas.

The Court: All right.

Q. (By Mr. Brett): Where did you talk to Mr. John J. Andreas?

\* \* \*

A. Palm Springs.

Q. And was that before July 19, 1954?

A. Yes.

Q. Will you state to the court briefly what the conversation was that you had at that time? [12]

\* \* \*

The Witness: The substance of the conversation was that he wished to sell his lands. I wanted him to understand that they would have to take a fee patent to all the land. They couldn't sell only one parcel. I wanted to be sure he understood that. And that was discussed.

Q. (By Mr. Brett): Now, did you have any conversation with Mr. Jerry Nathanson prior to July 19, 1954, with respect to this land? [13]

\* \* \*

The Witness: Yes.

Q. (By Mr. Brett): Where did you have that conversation?

A. In Palm Springs. I wouldn't know exactly, but in Palm Springs.



(Testimony of Henry Harris, Jr.)

Q. Will you give us the substance of that conversation?

\* \* \*

The Witness: That conversation had to do with the following things: Firstly, that it would be necessary that there be buyers for all the parcels of lands belonging to Mr. Andreas, otherwise I would not care to recommend because the lands would become subject to taxation. I explained that to him. Also, that I wished to have some money, some [14] type of protection for the Indian because of the difficulties existing at the time in litigation, so that if the Indian wished to go through with the sale and if the buyers then wanted to back out there would be money up that the Indian would be rightfully able to claim and own.

And, thirdly, that I wanted it to be clearly expressed and stated in writing that there would be no guarantee of title as to these lands or representation of any kind on the part of the Indians.

Q. (By Mr. Brett): Now, what, if anything, did you tell Mr. Nathanson with respect to protecting the Indian by having some form of deposit made? What did you tell him you would require?

\* \* \*

The Witness: I insisted on his opening an escrow, and I wanted to see it and know what was in it before I would recommend in order to cover the points that I mentioned, that there would be money which the Indian would receive if the buyers

(Testimony of Henry Harris, Jr.)

defaulted, and that there was no representation on title. [15]

\* \* \*

Q. (By Mr. Brett): May I ask, Mr. Harris, were you referring in any respect to any defect of title arising out of this transaction? Or were you referring to some suit that was pending against the land?

\* \* \*

The Witness: I have reference to pending litigation; and the fact that the title companies, although I had personally tried to get them to do so would not write title insurance on these lands.

Q. (By Mr. Brett): And was that pending litigation in this very court? I don't mean before his Honor, but the District Court of the United States in this District?

\* \* \*

The Witness: It was.

Q. (By Mr. Brett): What was the name of the case?

A. Segundo—I can't give you the full name. It was an action—Segundo vs. the United States, I believe.

Q. Now, Mr. Harris, after that conversation that you [16] had with John Andreas that you have referred to and the conversation you had with Mr. Jerry Nathanson, did you in addition to seeing the original of the application—that is, Defendants' Exhibit C—see the original of a superintendent's report on that application made by Mr. Ned

(Testimony of Henry Harris, Jr.)

Mitchell?           A. Yes, sir.

Q. And did you discuss the details that are set forth therein with Mr. Mitchell?

A. I believe that we talked prior to the time that he wrote it. I can't definitely state whether we had conversations after. I do know this, that we did consult on the matter and I did have this instrument before me at the time I talked to Mr. Hill.

Q. Now, prior to the time that you talked with Mr. Hill did you have before you and have knowledge of the original of the certificate of appraisal by Mr. Ned Mitchell, which is Defendants' Exhibit E?           A. Yes.

Q. Now, in that month of July, 1954, were you familiar with the 20-acre parcel which is the subject matter of this action?           A. I was.

\* \* \*

Mr. Baggot: There is no question of this man's good faith, Mr. Brett.

\* \* \*

Q. (By Mr. Brett): Mr. Harris, after having examined the exhibits, and before you talked to Mr. Hill, did you also have a copy of the escrow instructions that had been [18] initiated July 29th by the Citizens Bank?

A. I can only answer that by saying I believe so. I can't give you a positive answer. I knew of what was in them. I know that they were a part of the record when it went in; in other words, a part of our record in the Sacramento office. And I know

(Testimony of Henry Harris, Jr.)

that I would not have made the recommendation if they had not contained the things I insisted on. But I cannot pin it as to date, Mr. Brett. I am not able to do that.

Q. Now, after you had the original documents before you and knowledge of their contents and had information as to what was in the escrow, which is No. 3360, did you recommend approval to Mr. Hill?      A. I did.

Q. Will you state to the court what the purpose of that recommendation was?

A. In order to effectuate what the Andreases desired in order to enable them to sell their lands and get some income and some cash. And the other points I have already discussed, to protect them.

\* \* \*

### Cross-Examination

By Mr. Baggot:

Q. Mr. Harris, at the time of this transaction between plaintiff Andreas and the defendants Upchurch and Henderson you were in the position of assistant area director?      A. That's correct.

Q. And in that position you were an intermediary between Mr. Ned Mitchell, the District Agent, and Mr. Leonard Hill, the Area Director?

A. I would say that is correct.

Q. And whatever information you obtained concerning this transaction, I take it, you obtained primarily and first from Mr. Mitchell. Is that true?

A. Well, no, I wouldn't say that is true because

(Testimony of Henry Harris, Jr.)

I—I did talk with Mr. Mitchell, but I talked with the parties, also.

Q. I see. Now, Mr. Harris, the function of the Bureau of Indian Affairs in acting upon an Indian's application for a patent in fee is to determine to the best of the [26] ability of the Bureau whether or not the particular Indian that is applying for a patent in fee is capable of managing his own affairs, isn't that a correct statement?

\* \* \*

The Witness: I would say that is correct as far as it goes. I don't believe that is a full statement of the functions. But as far as it goes, I would agree. [27]

\* \* \*

Q. (By Mr. Baggot): Now, Mr. Harris, you testified on your direct examination that you recommended approval to Mr. Hill? A. Yes, sir.

Q. Now, my question is, what did you recommend approval of?

A. I recommended approval of the application for the granting of the fee patent in view of all the contents of the application, in order to implement the sale which the Indian desired to make.

Q. And the proposal as to this sale was just one of a number of factors that you took into consideration in recommending the approval of an application for a patent in fee, isn't that correct?

A. That is correct.

Q. And you did not, in your official capacity, per se, approve this sale? [29]



(Testimony of Henry Harris, Jr.)

A. I had no authority to approve anything.

\* \* \*

Q. (By Mr. Baggot): You mentioned, Mr. Harris, in your direct examination — and I don't know whether I can quote your exact words or not — it was part of your duty in your official capacity to protect this Indian insofar as possible.

A. That is certainly true.

Q. And one of the ways that you thought he should be protected would be by a binding escrow agreement. Is that right?

A. No, I didn't say anything about a binding escrow agreement. I said that I insisted that these things be contained in an escrow agreement. But I also insisted that there be no binding escrow of any kind, as far as the Indian [30] was concerned, until he put in his fee, which I don't believe is the same thing if I understand your question.

\* \* \*

Q. (By Mr. Baggot): What did you mean by the word "fee"?

A. Well, after the application is approved the fee title to the land is issued to the Indian. In this instance, because of regulations then in effect he would have to take the fee to all his land. That he would receive. Now then, if at that time he elected to come into this escrow and deposit that in order to consummate the deal, that would carry it through. I meant by that he would bring in the [31] instru-

(Testimony of Henry Harris, Jr.)

ment received from the Government, if he so wished.

The Court: Do I understand your statement to be that it was your purpose to see that he was not bound at all until the fee patent was issued to him?

The Witness: Very definitely. And I so explained to him and every other Indian down there to whom I talked to on any deal. They could not do anything until the fee was issued.

Q. (By Mr. Baggot): Now, did you actually see the escrow instructions?

A. Yes, I did. I believe I testified to that on direct this morning.

Q. Yes. I think this morning you weren't sure whether you saw them or not.

A. I said I wasn't sure as to the exact date I saw them. But I definitely saw them because they were reviewed with Mr. Hill before the thing was approved.

Q. I will show you Plaintiff's Exhibit No. 2, a copy of those instructions, and ask you if you recognize those as the instructions that you did see? [32]

\* \* \*

Q. (By Mr. Baggot): After you saw these escrow instructions you were then satisfied as far as the protection to the Indian was concerned, is that right, Mr. Harris?

A. I was satisfied they contained that which I insisted on, yes.

Q. And the purpose of that was to protect the Indian?

A. That is correct.

(Testimony of Henry Harris, Jr.)

Q. And you drew the conclusion that this was not binding on the Indian until such time as he deposited his fee patent into the escrow, is that right?

A. It was my intention that it should not be. I am not an attorney. I was of the opinion it served that purpose. [34]

Q. Will you take Plaintiff's Exhibit No. 2 and point out to the court and to me wherein these escrow instructions led you to that conclusion?

A. Would you be good enough to read this last paragraph at the bottom? I think it is down here.

\* \* \*

Here it is. I can read it.

"It is agreed and understood between buyer and seller that there is no title policy involved in this sale of property. And close of escrow will be when fee patent to the seller and the grant deed from the seller to the above vestees are recorded."

Q. That is when close of escrow will be?

A. That is correct. [35]

\* \* \*

Q. (By Mr. Baggot): Mr. Harris, this application for patent in fee, which is Exhibit C for the defendants, appears to be on the printed form of the Department of Interior and appears to be Form 5-105. Is that right? A. Yes.

\* \* \*

Q. (By Mr. Baggot): In this, of course, referring to Exhibit C, that was the standard form of application for patents in fee at the time Mr.

(Testimony of Henry Harris, Jr.)

Andreas made his application, isn't that true?

A. That is correct.

Q. Now, Mr. Harris, in addition to an application for a patent in fee an Indian at the time of this Andreas transaction could, if he so desired, apply to the Department of the Interior to sell his trust allotment by the approval of the Department of the Interior with the Department of the Interior, if it approved, giving a fee patent directly to the purchaser. Isn't that true? [36]

A. Well, that is academically correct. It wasn't the case at Palm Springs at that time. [37]

\* \* \*

### JERRY NATHANSON

called as a witness on behalf of the defendants, being first sworn, was examined and testified as follows:

The Clerk: Give us your full name, please.

The Witness: Jerry Nathanson, N-a-t-h-a-n-s-o-n.

#### Direct Examination

By Mr. Brett:

Q. Mr. Nathanson, you are one of the defendants in this action? A. Yes, I am.

Q. And you are the Jerry Nathanson that has from time to time been referred to in the evidence up to this time? A. That is true. [41]

\* \* \*

Q. (By Mr. Brett): Where do you reside?

A. I reside in Palm Springs.

(Testimony of Jerry Nathanson.)

Q. What is your occupation?

A. I am a real estate broker and member of the Palm Springs City Council.

\* \* \*

Q. (By Mr. Brett): During the entire year of 1954 were you a licensed real estate broker licensed by the State of California? A. Yes, I was.

Q. Do you know the plaintiff John Andreas?

A. I do.

Q. During that entire year and up to the time of escrow No. 3360 were you employed in any capacity by John Andreas? A. Yes, I was.

\* \* \*

Q. (By Mr. Brett): And with reference to the date of application for a fee patent — well, let's put it this way: With reference to July 19, 1954, were you employed [42] before that date?

A. Yes, I was.

Q. What was the employment?

A. That I would try to get customers to sell the parcels of land that they wanted to sell.

Q. As a real estate broker?

A. As a real estate broker.

Q. Did that employment include the 20 acres of land which is the subject matter of this action?

A. That was one of the parcels.

Q. Were you so employed at the time that you had the conversation with Mr. Henry Harris, Jr., which he testified to on the stand?

A. Yes, I was.

Q. Mr. Nathanson, I will show you a photocopy



(Testimony of Jerry Nathanson.)

of the amended escrow instructions which were dated December 15, 1954, and on which there is a notation that it was "Taken out to John by Jerry," and Mrs. Wilson has testified that that was in her handwriting and meant that she had delivered the original to you to take to John.

A. That is true.

Q. Now, you remember that occasion?

A. Now I do.

Q. Did you go out and obtain John Andreas' signature on the document? [43]

A. Yes, I did.

Q. At that time were you employed by him as a broker?

A. Yes, I was. [44]

\* \* \*

### Cross-Examination

By Mr. Baggot:

Q. Mr. Nathanson, do you have knowledge as to when the fee patent from the United States Government to John Andreas was received by Mr. Andreas?

A. I have knowledge when it was issued and approximately when it was received.

Q. Approximately when was it received?

A. Around the 20th or 21st of the month of December 1954. It was issued on December 14, 1954.

\* \* \*

Q. (By Mr. Baggot): Could it have been received on December 24, 1954?

A. I said "approximately." It could have been. I wasn't concerned with when it was received. I

(Testimony of Jerry Nathanson.)

was concerned when it was issued, because as I understood the Federal law it was effective when it was issued and not when it was received.

Q. As a matter of fact, you were concerned when it was received, weren't you? As soon as it was received you got it and took it into the escrow, didn't you? [47]

A. Part of the escrow, to record it. I was concerned only when it was issued, because on December 1st Mr. Andreas called me and asked for a \$500 advance. I approached Mr. Henderson and Mrs. Upchurch on the advance and they said they wouldn't permit any advance until fee title was issued and grant deed recorded. When I found on December 14th that the fee title was issued I called Mrs. Andreas and told her that she could probably get her money because the fee title was issued. That is why on December 15th we went into escrow to amend the instructions, because we knew the fee title was issued and the grant deed could be recorded according to the instructions of the escrow.

\* \* \*

Q. (By Mr. Baggot): You learned about the issuance of [48] this fee patent the very day it was issued in Washington, D. C., didn't you?

A. That's right.

\* \* \*

Q. (By Mr. Baggot): You received a 10 per cent commission in this particular case?

A. Yes, I did.

\* \* \*

[Endorsed]: Filed September 24, 1958. [49]

[Title of District Court and Cause.]

### CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages numbered 1 to 88, inclusive, containing the original:

Answer and Counterclaim, Second amended;  
Affidavit in support of order extending time on appeal;

Designation of contents of record on appeal;  
Designation of additional portions of record on appeal;

Notice of Appeal;

Order extending time to docket appeal;

Statement of points on appeal;

Complaint;

Stipulation and order amending complaint;

Findings of Fact, Conclusions of Law and judgment;

Memorandum of Decision;

Names and Addresses of Attorneys;

Motion for New Trial;

Order Denying Motion for New Trial;

Reply to Amended counterclaim, answer to amended cross claim, demand for jury trial upon factual issues;

Stipulation as to facts;

Stipulation and order re plaintiff's answer to counterclaim; and

Exhibits 1, 2, 3, 4, 5, 6, inclusive; Exhibits 8, 9, 10, 11, 12, 13, 14, inclusive. Exhibits A, B, C, D, E, inclusive; Exhibits G, H, I and J, inclusive. And one volume of reporter's transcript dated November 20, 1957.

I further certify that my fee for preparing the foregoing record, amounting to \$1.60, has been paid by appellant.

Dated: September 25, 1958.

[Seal]                      JOHN A. CHILDRESS,  
Clerk,

By /s/ EDWARD F. DREW,  
Deputy Clerk.

---

[Endorsed]: No. 16198. United States Court of Appeals for the Ninth Circuit. John Andreas, Appellant, vs. Lillian R. Henderson, Frances Upchurch, Jerry Nathanson, Samuel Sontag and George Goldberg, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed and Docketed: September 27, 1958.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

United States Court of Appeals  
for the Ninth Circuit

No. 16198C

JOHN ANDREAS,

Appellant,

vs.

JANE DOE HENDERSON, et al.,

Appellees.

APPELLANT'S STATEMENT OF  
POINTS ON APPEAL

Pursuant to Rule 17 (6) of the Rules of the above-entitled Court, the following is a concise statement of the points on which appellant, John Andreas, intends to rely on his appeal herein:

1. Any conveyance of trust land or contract touching the same made during the trust period is absolutely null and void.

2. There was a contract between appellant and appellees Upchurch and Henderson made during the trust period which (but for the General Allotment Act and the Mission Indian Act) was valid and binding.

3. A conveyance was made during the trust period.

4. A conveyance made after the termination of the trust period pursuant to a contract made during the trust period is void.



5. The deposit of the deed in escrow by appellant was irrevocable and title related back to, and passed as of, that time.

6. The contract could not be ratified because it was void.

Dated: October 3, 1958.

WARREN E. SLAUGHTER,  
VAUGHAN, BRANDLIN &  
BAGGOT,

By /s/ THOMAS G. BAGGOT,  
Attorneys for Appellant.

[Endorsed]: Filed October 4, 1958.

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[Title of Court of Appeals and Cause.]

STIPULATION THAT EXHIBITS MAY BE  
CONSIDERED IN THEIR ORIGINAL FORM

It Is Hereby Stipulated by and between the parties hereto, through their respective counsel, the undersigned, that none of the exhibits which have been certified as part of the record on appeal need be printed as part of the record, pursuant to Rule 17 of the Rules of the United States Court of Appeals for the Ninth Circuit, but any and all may be considered in their original form. Many of said exhibits consist of memoranda, correspondence, escrow instructions, deeds, patents and other docu-

ments which would be costly to print and can better be observed in their original form.

All parties may quote or reproduce said exhibits, or any portions thereof, in their respective briefs or in the appendices thereto.

Dated: October 3, 1958.

WARREN E. SLAUGHTER,  
VAUGHAN, BRANDLIN &  
BAGGOT,

By /s/ THOMAS G. BAGGOT,  
Attorneys for Appellant.

IRL DAVIS BRETT,  
/s/ IRL D. BRETT,  
Attorney for Appellees.

[Endorsed]: Filed October 4, 1958.

No. 16199

See Also

3098

United States  
Court of Appeals  
For the Ninth Circuit

JAMES BURTON ING and RAYMOND  
WRIGHT,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record  
In Two Volumes

Volume II  
(Pages 277 to 569)

Appeals from the District Court  
for the District of Alaska,  
Third Division



No. 16199

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United States  
Court of Appeals  
For the Ninth Circuit

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JAMES BURTON ING and RAYMOND  
WRIGHT,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

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Transcript of Record  
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(Testimony of Edward J. Harkabus.)

(Thereupon, at 12:00 o'clock noon, February 24, 1958, the Court continues the cause to 2:00 o'clock p.m. of the same day.)

(At 2:00 o'clock p.m., February 24, 1958, counsel for plaintiff being present and counsel for the defendants being present, the trial of said cause was resumed and the following proceedings were had out of the hearing of the jury and the spectators:)

The Court: You may proceed, Mr. Plummer.

Q. (By Mr. Plummer): Thank you, your Honor. Was it your testimony, Mr. Harkabus, that you were present at all times and in fact typed up the certificate marked for identification as Plaintiff's Exhibit No. 20? [249]      A. It is.

Mr. Plummer: May I approach the witness, your Honor?

The Court: You may.

Q. (By Mr. Plummer): And was it your testimony this morning, sir, that before the statement was typed and signed by Mr. Charles E. Smith, that he had an attorney come there to help him?

A. Yes.

Q. Now, was there at any time any threat made to Mr. Smith?      A. No.

Q. Was there at any time any promise made to Mr. Smith?      A. No, sir.

Q. Now, would you tell me, if you know, that the—if the defendant Smith was arraigned on this charge down in Seattle?      A. He was.

(Testimony of Edward J. Harkabus.)

Q. And do you know the date he was arraigned?

A. March 18, 1957.

Q. Now, subsequent to the arraignment, did you—or, prior to arraignment did this defendant waive extradition?

A. I was informed that he had, yes.

Q. Well, did you return to the Territory of Alaska with this defendant?

A. Yes, I did.

Q. And do you know what date that was?

A. It would have been the 21st day of March, 1957. [250]

Q. And did you ride on the same plane with him? A. I did.

Q. And could you tell us, if you recall, how you were seated in the plane?

A. Well, a portion of the time, as I recall, I sat adjacent to the defendant, Mr. Smith, and we engaged in conversation at that time.

Q. That would be two-abreast, sitting, and you were seated with him? A. Yes, sir.

Q. Did you talk to him about the contents of the statement at that time?

A. We mentioned it, yes.

Q. And do you recall what his statements were in regard to the statement?

Mr. Nesbett: I will object to that. After all, we are only concerned with one thing at the moment and that is this particular statement that was written and is being offered in evidence, as I understand it.

(Testimony of Edward J. Harkabus.)

The Court: That is correct, Mr. Plummer.

Mr. Plummer: This conversation has to do with this statement that we are offering in evidence now, Plaintiff's Exhibit No. 20, your Honor.

The Court: Well, would it go to the admissibility or inadmissibility of that statement? [251]

Mr. Plummer: I think it probably would go to the admissibility of it if it does get in. Of course, the jury is gone—if the Court thinks——

Mr. Nesbett: I will withdraw the objection.

The Court: There is nothing before the Court. You may proceed.

Q. (By Mr. Plummer): Tell me what he said in regard to the statement at that time.

A. I asked him if he knew any more than he had incorporated in his statement, if he had any additional details, and he said, no, that as far as he could recall that this was in fact what had happened in his participation in the M-K check deal.

Q. You made no threats or promises to him on that occasion?      A. I did not.

Q. Now, do you recall whether or not this defendant was arraigned after he got back to Anchorage on the same charge?

A. I was informed that he was, but I don't know of my own knowledge.

Q. I would ask the Court to take notice of its own files, look at the Held to Answer papers which will show that this defendant was arraigned in Commissioner's Court, advised of his rights by Com-

(Testimony of Edward J. Harkabus.)

missioner Warren Colver on March 21, 1957, at Anchorage.

The Court: The Court will take judicial notice then of [252] its own records.

Mr. Plummer: Thank you, your Honor.

The Court: You may proceed.

Q. (By Mr. Plummer): And, following the date I just mentioned, did you have an occasion to see this defendant in my office? A. I did.

Q. And who else was present, if you know?

A. Mr. Pass and yourself.

Q. And what, if anything, did I do at that time with regards to this Plaintiff's Exhibit No. 20 that you had in your hand?

A. Well, my recollection is that you went over the statement here where—and it was reaffirmed by the defendant, Mr. Smith, and additionally——

Q. Did I have a conversation with him?

A. Yes, you did.

Q. And would you tell me what that conversation was?

A. Well, the conversation was to the effect, "Do you have any additional knowledge other than that contained in the statement concerning the M-K check scheme."

Q. And do you recall what the defendant's answer was?

A. He said, "No, sir. It's all in the statement."

Q. And did we have any further conversation at that time and place in your presence?

A. Well, my recollection is that the defendant



(Testimony of Edward J. Harkabus.)

indicated to you [253] at that time that he wanted to plead guilty to this charge and to begin service of his sentence immediately so he'd get it over with.

Q. Yes, sir. Now, did you have occasion to see the defendant at a later time? A. I did.

Q. And would you tell us when that was, sir?

A. That would have been March 27, 1957.

Q. And would you tell us where that was?

A. It was Territorial Police Headquarters.

Q. And will you tell the Court who was present during that time you saw him, at the time you saw him?

A. At the time I saw him at the Territorial Police Headquarters, Officer Ed Dankworth, polygraphic examiner for the T. P. was there, where we had an interview with Mr. Smith concerning another matter.

Q. Was there any conversation about Plaintiff's Exhibit No. 20 at that time?

A. There was.

Q. And would you tell us what that was, sir?

A. Well, in effect, Mr. Smith reiterated the veracity of the statement at that time.

Q. And did you have occasion to see him on another time in the company with anybody else?

A. Well, that same date that I have mentioned, on March 27th, [254] I was with Mr. Smith and Sgt. Laird of the Territorial Police and Mr. Pass, I believe, and we used the statement; we went over the statement in detail to attempt to ascertain the places that had been visited by Mr. Smith during

(Testimony of Edward J. Harkabus.)

the course of his passing the bogus checks and the subsequent actions of Mr. Smith when he got rid of the merchandise that he had picked up during the course of this swindle, check swindle, and Mr. Smith at that time was very cooperative in attempting to show us the various locations of the roads and so forth, but it was rather difficult inasmuch as I believe there was still snow on the ground, or something to that effect, but we did go around to the various places that are indicated in this statement.

Q. Now, did—were any threats made to him on that occasion?      A. No, sir.

Q. Were any promises made to him on that occasion?      A. No, sir.

Mr. Plummer: I have no further questions to ask this witness. I would ask leave of Court, however, that after the cross-examination—after he has been excused, if the Court finds it necessary, I will want to recall him to—after we have elicited all the information on it.

The Court: For that purpose, you may do so. You may proceed, Mr. Nesbett. [255]

### EDWARD J. HARKABUS

testifies as follows on

### Cross-Examination

By Mr. Nesbett:

Q. Mr. Harkabus, when was the first date that you first saw Mr. Smith?

A. The first date that I saw Mr. Smith would

(Testimony of Edward J. Harkabus.)

have been approximately March 15th of 1957. I may have seen him in Fairbanks prior to that time, but I had no reason to see him.

Q. In connection with this case it was approximately March 15th of 1957, is that right?

A. That's right, sir.

Q. And was that in Seattle?

A. That was in Renton, Washington.

Q. In Renton. Are you sure that was the 15th? You said "approximately" and I was wondering if you could be certain that it was that?

A. I am certain it was that.

Q. What day of the week was it?

A. The 15th I believe was a Friday.

Q. And where did you see Mr. Smith on that date, first?

A. Well, where I saw him was at his residence at 11815 78th South Avenue, Renton, Washington. Mr. Smith—I was in the vehicle of the King County Sheriff's Office.

Q. I just asked you where you saw him. You have answered the [256] question.

A. All right, sir.

Q. Did you have occasion to go into the residence at that address you recited?

A. I did not.

(The witness answered simultaneously and prior to the completion of the question.)

Q. Will you wait until I finish the question be-

(Testimony of Edward J. Harkabus.)

fore you attempt to answer it? Mr. Harkabus, did you attempt to go into the residence at that address?

A. No.

Q. Did you ever go into the residence at that address? A. No, sir.

Q. Who was with you on that occasion?

A. It was Lt. Wayland of the King County Sheriff's office and Special Deputy Marshal Ted Pass, Lt. William Trafton——

Q. Well, Lt. Trafton was a member of the Territorial Police in Alaska, was he not?

A. Yes, sir.

Q. And Mr. Pass was a member of the Anchorage Police Force, is that right?

A. Well, my information was that he was a Special Deputy U. S. Marshal, Mr. Nesbett.

Q. I see, and you were Special Deputy for the Fire Underwriters?

A. No, I am Special Agent with them.

Q. Special Agent? [257] A. Yes, sir.

Q. And Wayland was with the Sheriff's office there? A. King County Sheriff's office.

Q. You all three traveled in the same car to the address in Renton, didn't you?

The Court: You——

A. We did.

The Court: You mean all four, don't you, counsel?

Q. (By Mr. Nesbett): All four, excuse me—including the Sheriff's Deputy—all four of you traveled to that address in Renton?

(Testimony of Edward J. Harkabus.)

A. Yes, sir.

Q. And did any one of you four have a warrant for Mr. Smith's arrest?

A. I believe that Mr. Pass had the warrant.

Q. You believe that he had it. Did you see it?

A. Yes, I did.

Q. You saw it? A. Yes, sir.

Q. And what did the warrant indicate the reasons were for arresting Mr. Smith?

A. Well, I believe it was for forgery, offhand. I didn't look at it in detail. In fact, my recollection is that I just saw it in a passing glance.

Q. What were you doing with that group anyway? Aren't you ordinarily concerned with fire losses and such? [258]

A. Fire losses and other losses, Mr. Nesbett.

Q. And are you ordinarily connected with crime investigation other than arson? A. Yes.

Q. How did you happen to be with these three officers on that date?

A. I happened to be with them because I was conducting another investigation and I desired to interview Mr. Smith and the reason that I was with them was that there was a Marshal's party that was leaving from Fairbanks and that I was sent out as a guard for them.

Q. So that put you in Seattle, is that right?

A. That's right.

Q. And you were investigating another matter and you wanted to go along with these officers on that day to see Mr. Smith? A. That is right.



(Testimony of Edward J. Harkabus.)

Q. Now, to get back to the warrant, did you actually see and read the warrant?

A. I didn't read it, no.

Q. Did Officer Pass ever show it to you?

A. Yes, he did.

Q. And where did he show it to you?

A. Well, I believe that I saw it when he—I am not sure of this point now. I believe he read it to Mr. Smith. If it wasn't at Mr. Smith's residence, I believe that he read it [259] to him at the King County Jail, or the Sheriff's office, rather, not the King County jail.

Q. You went into the residence then, didn't you?

A. No, I didn't go into the residence.

Q. You didn't go into the residence at all?

A. No, sir.

Q. What preliminary steps were taken by the King County Sheriff's office with respect to determining whether or not Mr. Smith was at home at that address on that date?

A. I believe that Lt. Wayland radioed to the dispatcher at King County and requested that he make a pretext call to Mr. Smith to ascertain whether or not he was home at that time.

Q. And it was determined that Mr. Smith answered the telephone so the officers then went up to the door of the residence, isn't that right?

A. Yes, sir.

Q. And where were you?

A. Well, I was by the vehicle in the driveway.

(Testimony of Edward J. Harkabus.)

Q. And rather short, fifteen to twenty feet from the door, were you?

A. Well, in actuality there was no door. It was boarded over was my recollection of it.

Q. The door was boarded over?

A. I believe so; that was in the front [260] portion.

Q. Where did they go, to the rear door?

A. I assume they did.

Q. Did you get out of the car at all?

A. I got out of the car, yes.

Q. Did you walk toward the rear door?

A. Well, I was near the car. I mean, I may have walked toward the front fender, but I mean, as far as entering, if that is what you are implying, why, I didn't.

Q. Well, don't be concerned with what I am implying, just answer the question. Where did you go when you got out of the car?

A. I got out of the car and I was in the driveway, Mr. Nesbett.

Q. Well, were you standing next to the car or away from the car?

A. I was standing adjacent to the car.

Q. You could see the doorway from where you were standing?

A. Yes, sir.

Q. The three other officers went to the doorway, did they?

A. No, they went to the rear of the house.

Q. Well, there was a door there, wasn't there?

A. Where?

(Testimony of Edward J. Harkabus.)

Q. There was a door at the rear of the house, wasn't there?

A. Well, I don't know if there was or not. I would assume there was.

Q. Well, you said you could see them from where you stood. Now, [261] could you see a door or not?

A. I said I could see the door from where I stood.

Q. All right, the three officers went to the door, did they not?

A. Not to the door I could see. They went up to the driveway beyond my range of vision.

Q. When—then you couldn't see how or where they entered that house, is that your testimony?

A. Yes.

Q. Did you overhear anything that occurred before they entered?      A. No.

Q. You didn't overhear a thing. How far were you from the point where they entered the house, if you can estimate?

A. Well, if I don't know where they entered the house, it would be hard for me to tell you that.

Q. Well, don't argue with me. Can you tell me yes or no? Can you judge that distance or not?

A. Will you repeat?

Q. Can you estimate that distance from where you were standing to where they entered the house?

A. Well, I could estimate the distance toward the rear end of the driveway.

Q. All right. How far is that?

(Testimony of Edward J. Harkabus.)

A. Maybe fifty feet.

Q. Fifty feet?

A. Something like that. [262]

Q. Then you were fifty feet from the door at the time the three officers disappeared from your view, is that about it?

A. That is about right.

Q. And they disappeared in the direction of the house so that the entrance would be somewhere beyond fifty feet from you, is that right?

A. I would say so, offhand.

Q. You—did you overhear anything they said before they entered?

A. No, sir, not to my recollection, I didn't.

Q. Did you overhear Mrs. Smith say that "Charles Smith is not here"?

A. I did not.

Q. You didn't hear anything else? (pause) You heard the Sheriff—King County Sheriff's officer announce his identity?

A. I am sure he identified himself; I believe I did hear that.

Q. You did hear that?

A. I believe I heard it.

Q. And did you hear him ask if Mrs. Smith—if Charles Smith was there?

A. No, sir, I didn't.

Q. Well, didn't you listen after you heard the first remark?

A. Well, I am not even positive that I heard it.

(Testimony of Edward J. Harkabus.)

I would assume that he did announce his identity. That's the only—— [263]

Q. You know, as a matter of fact, Mr. Harkabus, that Mrs. Smith, the defendant's mother said, "He's not here," and that the officer brushed her aside and went straight on in the house, don't you? You don't want to admit it?

A. I do not, Mr. Nesbett.

Q. You don't know that? A. No.

Q. You overheard a part of the conversation; you heard the officer announce his identity, didn't you? A. I said I believe that I did, yes.

Q. Well, you wouldn't believe that you heard it unless there was some good basis in your memory for thinking that you had heard it, would you?

A. I have already answered your question; I believe that I heard it, Mr. Nesbett.

Q. But you didn't hear another thing that occurred there?

A. I didn't hear the conversation that you have outlined to me, no.

Q. What did you next see or hear?

A. I believe that he came—that they came out with the defendant, Mr. Smith.

Q. You believe that they came out with him?

A. Yes, sir.

Q. Well, they did, didn't they?

A. Well, they did in fact. [264]

Q. And is that the next thing you observed after you heard the officer announce his identity at the door? A. As far as from where I was, yes.



(Testimony of Edward J. Harkabus.)

Q. Who had Mr. Smith in custody of those three officers? A. I believe Mr. Pass did.

Q. And was he handcuffed?

A. I don't recall.

Q. Was Mrs. Smith to be seen yet at all, the defendant's mother?

A. I never did see Mrs. Smith.

Q. You never did? A. No, sir.

Q. Are you sure you didn't go in that house?

A. I am positive.

Q. But you saw a warrant that Officer Pass had?

A. Well, my recollection was that he showed me the warrant. I can't remember whether it was prior to the time or later at King County jail. Now, that is what I said.

Q. You aren't sure whether he had a warrant at that time or not, are you?

A. I am pretty sure he did, or he wouldn't be arresting him.

Q. You hoped he had, but you are not sure?

A. I didn't necessarily "hoped" he had.

Q. You didn't see it prior to their entering the house on that day, did you?

A. Well, I previously testified that I thought that I had. [265]

Q. Well, if you saw——

A. And I am trying to——

Q. Go ahead.

A. I am trying to remember exactly. It's been a little while ago, but——

(Testimony of Edward J. Harkabus.)

Q. If you saw it later at the King County jail—can you remember now where the warrant issued, out of which or whose jurisdiction?

A. I believe it was out of Anchorage, out of this court.

Q. Out of this court? A. Yes, sir.

Q. And that it was a warrant for the crime of forgery? A. I believe that's right.

Q. You believe that's right?

A. Uttering a false instrument, or something to that effect. I didn't arrest Mr. Smith, so I'd have no idea why or what the full charge is.

Q. I realize that. I am just trying to find out what you remember, if anything. Now, what was done with Mr. Smith by the officers and yourself?

A. Well, he was transported then from his residence there to King County Sheriff's Office.

Q. About what time of day was that?

Q. I'd estimate that we arrived at Mr. Smith's residence around 3:30 or somewhere [266] thereabouts.

Q. Can you estimate approximately when you arrived at the King County jail?

A. Well, I don't know the exact distance to Renton, but I do recall that we were slowed up quite a bit because of Boeing traffic which apparently has a shift change at that time and just on the assumption that it was around 3:30, I believe it would have been perhaps around 4:30; maybe not that long, maybe half an hour or some-

(Testimony of Edward J. Harkabus.)

thing like that. I don't know how far it is, actually, to Renton.

Q. Probably 4:30 when you arrived at the King County jail, approximately?

A. Just roughly I'd say, yes.

Q. What was done then with Mr. Smith, if you know?

A. I believe he was interviewed by Mr. Pass and Mr. Trafton.

Q. Where was the interview conducted?

A. It was at King County or the King County Sheriff's office.

Q. You were present too, weren't you?

A. I believe that I only asked Mr. Smith a couple of questions at that time and he indicated that he didn't have any knowledge of that, so that I wasn't present if you mean throughout the interview, no, sir.

Q. Well, were you present at the commencement of the interview?

A. Yes.

Q. And did you ask your questions concerning the matter you were investigating before the other officers— [267]

A. No, sir.

Q. (Continuing): —commenced their investigation?

A. No, sir.

Q. Who commenced the investigation or interview first, which officer?

A. I believe Mr. Pass did.

Q. I see. How long was Mr. Pass engaged in his interview?

A. Well, after Mr. Pass told the defendant that

(Testimony of Edward J. Harkabus.)

he didn't have to make a statement and that he was entitled to the services of an attorney, he went in and began to ask him about his participation, alleged participation, of the M-K check deal and I can't recall how long I was in the room—maybe half an hour.

Q. Then did you have an opportunity then to ask your questions?

A. Yes, I did. I told him that I didn't have too much interest in this other matter and that I wanted to ask him these questions if I could.

Q. Did you ask him? A. I did.

Q. And did he answer? A. He answered.

Q. And did you then leave?

A. I left the room, yes.

Q. You left the room. Was the defendant and the other officers still there? [268]

A. Yes, sir.

Q. The other officers were still interviewing, is that your recollection? A. Yes, sir.

Q. Did you go back in that interview room that day?

A. I may have been in there later, yes.

Q. You may have? A. Yes.

Q. Well, don't you recall whether you went in there later or not?

A. Yes, I do recall and I don't believe I re-entered the interview room. I was in the chief deputy's office is my recollection.

Q. Was that the—adjacent to the interview room?

(Testimony of Edward J. Harkabus.)

A. Well, it's down the hall from it, yes.

Q. As a matter of fact, didn't you remain in that interview room until late at night, until Mr. Smith finally signed the consent to be extradited?

A. No, sir.

Q. You did not?           A. No, sir.

Q. Would you say then that after you arrived at King County jail, that you left the interview room at approximately 5:00 o'clock or thirty minutes after you got there?

A. I'd say that that is about right, yes, a little after five. [269]

Q. And that you never returned to the interview room that evening?

A. Well, I may have ducked in there or out; I am not sure of that.

Q. Did you take any part in the interview after you had asked your questions?

A. After I left, I don't believe that I did, no, sir.

Q. You don't believe that you did. Is your recollection hazy on that point?

A. Not particularly.

Q. Now, you have testified, I believe, that Officer Pass informed the defendant that he was entitled to counsel?           A. Yes, sir.

Q. And that he need not make a statement?

A. Yes, sir.

Q. Well, did he come right out and say right at the commencement of the interview, "Now, you don't have to make a statement"?

A. He did. He informed him that he didn't have



(Testimony of Edward J. Harkabus.)

to make it; that he could have the services of an attorney.

Q. You remember that? A. I do.

Q. Very well? A. Yes.

Q. Was the defendant sitting down or standing up at that time? [270] A. He was sitting.

Q. Where were you in the room with relation to the defendant?

A. I would have been to the left of him, I believe.

Q. Weren't you sitting at a desk in the room?

The Court: Well, it was a long table what I recall.

Q. (By Mr. Nesbett): You were sitting at the table, weren't you?

A. I wasn't—if you mean was I sitting directly in front of the defendant, Mr. Nesbett—

Q. Were you sitting at the table, first?

A. I was at the table, yes.

Q. And the defendant was close by you, was he?

A. No.

Q. Sitting at the table, also?

A. Well, I believe he was on the other side.

Q. Was Lt. Pass standing or sitting?

A. He was sitting.

Q. Were those relative positions maintained for approximately the thirty minutes that you were in there? A. I believe they were.

Q. All right, now, did you see Mr. Smith again that day that you remember as Friday the 15th, after you had once left the interview room?

(Testimony of Edward J. Harkabus.)

A. I don't believe that I did, no.

Q. Mr. Smith hadn't admitted any implication or connection with [271] this M-K matter as of the time you left that room, had he? A. No.

Q. He had not, had he? A. No.

Q. Now, when did you next see Mr. Smith?

A. I next saw him on the 17th.

Q. That would be on a Sunday, would it not?

A. Yes, sir.

Q. At about noon?

A. No, I believe it was after that. I had previously testified it was somewhere around 2:00 o'clock, as I recall.

Q. Well, it was afternoon then?

A. Yes, sir.

Q. And who was with you on that occasion and where did you see him?

A. I saw him at King County jail. Lt. Trafton was with me and Officer Pass.

Q. And are those the only persons?

A. Yes, sir.

Q. And did you use the same interview room that had been used the day before?

A. No, sir.

Q. Another room?

A. It was another section of the same building but he had been incarcerated in the jail, understand. [272]

Q. Overnight, he had been in jail overnight?

A. Yes, sir.

Q. Now, was the interview continued with Mr.

(Testimony of Edward J. Harkabus.)

Smith?           A. Continued, yes.

Q. Who conducted the interview?

A. Well, there were three of us present and I believe we all took a part in the interview.

Q. Didn't you, Mr. Harkabus, carry the main part of the interview as far as the officers were concerned?

A. I believe that you might say that I did, yes.

Q. You were seated at a table, weren't you, and Mr. Smith was somewhat on your left at the same table?           A. Uh-huh.

Q. And Lt. Pass was sitting down to Smith's left, somewhat?           A. Well——

Q. Is that about right?

A. Well, no, I believe that Special Deputy Pass was across the table from me and that would have put him on Smith's left.

Q. Smith's left, and Trafton was standing up, wasn't he?           A. I believe he was.

Q. And that those were the only persons present when the interview was commenced on Sunday, is that right?           A. Initially, yes.

Q. Initially, yes. Now, what was the nature of the interview as far as you were concerned and as far as you participated [273] on that Sunday? Was it in connection with this M-K matter or the matter that you were interested in?

A. Well, it was a little of both.

Q. A little of both?           A. Yes, sir.

Q. And was it during that interview that Mr. Smith admitted connection with this M-K thing?

(Testimony of Edward J. Harkabus.)

A. Yes, sir.

Q. Now, approximately how long after he had been in the interview room was it that he made an admission?

A. I believe it was around, roughly, forty-five minutes, something like that.

Q. Now, during that forty-five minutes, were you, yourself, making notations of anything that Mr. Smith was saying?

A. I was, yes.

Q. You were making penciled notations, weren't you?

A. Yes, sir.

Q. I'll ask you, during that interview didn't the jailer have occasion to announce that Mr. Smith's attorney was there and wanted to see him?

A. He did.

Q. And did you not tell the jailer, "The attorney can see him when we get thru with him"?

A. I did not.

Q. You did not? You deny that specifically?

A. I do, specifically and vehemently.

Q. Right. Now, what happened then after the jailer announced that Mr. Smith's attorney was there?

A. There was some conversation as to whether or not we should continue the interview and I suggested that we let him see his attorney. That was my suggestion.

Q. There was some conversation between whom?

A. Well, Mr. Pass said that he—the jailer initially came up and said when they're booked as a Federal prisoner, something to the effect that their

(Testimony of Edward J. Harkabus.)

policy at King County was that they didn't let them in unless they—it was all right with the officer or something to that effect, but——

Q. Well, now, don't go too fast and get us confused. The jailer said there was a policy in connection with Federal prisoners, is that right?

A. Yes.

Q. And that policy was what, as you recall it?

A. He stated that——

Q. That is the jailer stated? A. Yes.

Q. Go ahead.

A. He said that, in effect, that unless they wanted to let the attorney in that he was a Federal prisoner or something to that effect and——

Q. We'll stop there. Unless he wanted to let the attorney in——[275]

A. That he didn't have to, something——

Q. The jailer didn't have to? A. Uh-huh.

Q. Is that the way you understood him to remark?

A. That is the way I took it. I don't know whether that is right, but that is the way I understood——

Q. Well, what—if you know, why did the jailer come and tell you fellows that?

A. I don't know why he did that.

Q. He said, "There is an attorney out here that wants to see the defendant," is that right?

A. That's right.

Q. And then he went on to state that, "There is a policy in connection with Federal prisoners that



(Testimony of Edward J. Harkabus.)

I don't have to let their attorney in if I don't want to," is that right?

A. Something to that effect.

Q. Something to that effect. Well, you didn't want to see the attorney, did you?

A. Not particularly.

Q. Now, you went on with the interview, didn't you?      A. Yes, for a few minutes.

Q. For approximately twenty — twenty-two — twenty-five minutes, didn't you?

A. Well, my recollection is that the interview had bogged down at that point and Mr. Pass went to discuss this matter [276] with Mr. Harris, the attorney, and we were more or less holding the interview in abeyance until he came back.

Q. You had, up to that time, been writing down some things Mr. Smith had been telling you, hadn't you?      A. Yes, sir.

Q. In longhand?      A. Yes, sir.

Q. You had Mr. Smith almost to the point where you thought he was going to sign something, didn't you? Now, just be honest with us.

A. I am trying to remember. Will you ask the question again, please?

A. You had Mr. Smith at that time almost to the point where you thought he might sign something for you, didn't you?

A. Well, he had already admitted his complicity in the check case.

Q. Well, to get back to the question, you had him to the point where you thought he was almost

(Testimony of Edward J. Harkabus.)

ready to sign this thing you had been writing on, didn't you?

A. Oh, no, sir, because no one can read my notes. I didn't anticipate him him signing that at all.

Q. Well, did you continue to prepare notes and interview Mr. Smith after the first announcement by the jailer?

A. Well, Mr. Pass had talked to the attorney is my recollection, and I don't know what he did say to him, but the attorney did [277] come in.

Q. Well, didn't you hear him talk with the attorney? A. No, sir.

Q. And you stayed with Mr. Smith, did you, while Mr. Pass was talking to the attorney?

A. Lt. Trafton and I were there with Mr. Smith.

Q. Talked with the attorney?

A. No, Mr. Nesbett, Mr. Pass talked to the attorney; Lt. Trafton and I were with Mr. Smith.

Q. Stayed with the defendant?

A. Yes, sir.

Q. But you couldn't overhear anything that Mr. Pass said to the attorney, is that right?

A. No, sir, I didn't.

Q. Did the jailer come in any more and make any more remarks about the defendant's attorney being around?

A. He came in again and said the attorney was still there and I suggested that Mr. Harris come in; that they let Mr. Harris come in and talk to Mr. Smith inasmuch as he was the attorney.

(Testimony of Edward J. Harkabus.)

Q. Was that after Pass had been out to see him?  
A. Yes, sir.

Q. After Pass went out to see him, the attorney did not come back in, did he? The attorney did not follow Pass back in the room, did he?

A. Yes, he did. [278]

Q. Well, what was the occasion for your suggesting that he allow Mr. Harris to come in then?

A. Well, I thought it was a good idea, that's all.

Q. But if Pass was bringing him in and you didn't overhear what was occurring between Pass and the attorney, why was your suggestion that you made that he be brought in?

A. Well, one of us is confused, Mr. Nesbett, and possibly it's me, but my point was that, initially Mr. Pass had talked to the attorney and what the conversation was, I don't know. Mr. Pass came back and subsequently the jailer indicated that the attorney was there and then I stated, "I think it's a good idea for you to let him see him."

Q. All right. Now, when Mr. Pass came back, the attorney was not following him in?

A. He was.

Q. He was? A. On the second occasion.

Q. On the second occasion? A. Yes, sir.

Q. Did Pass go back out and get the attorney after you suggested that it would be a good idea to bring him in?  
A. I believe he did.

Q. Well, then what was the occasion for the jailer coming back the second time?

(Testimony of Edward J. Harkabus.)

A. Well, you will have to ask the jailer; I don't know. [279]

Q. You don't know? A. No, sir.

Q. Mr. Harkabus, didn't it occur about like this: that during this interview the jailer came and said, "There's an attorney here who wants to see this defendant," and did you not reply to the jailer, "He can see him when we get thru with him"?

A. I have answered your question previously.

Q. Well, answer yes or no. A. No.

Q. Did the jailer not come back a second time after that and say, "This man's attorney wants to see him, and it's my belief that he has a right to see his attorney"? A. No, sir.

Q. And that you again answered he can see him when we get thru with him? A. No, sir.

Q. You did not? A. No.

Q. And that the next thing that occurred was that the jailer had the attorney standing in the door? A. That is not my recollection at all.

Q. You don't recall it that way?

A. No, sir.

Q. Well, it was about twenty minutes after the attorney was first announced that Mr. Pass brought him in then, is that [280] your testimony?

A. That's right.

Q. He got just as far as the door, didn't he—the attorney got just as far as the door, didn't he?

A. What door?

Q. The door entering into the interview room.

(Testimony of Edward J. Harkabus.)

A. He was within the door; he had entered the room.

Q. He just got inside the door, then?

A. Well, it wasn't—well, I don't know how far he had been in, but he was in the room.

Q. How far in the room?

A. Well, he was within three feet of Mr. Smith, I'd say offhand.

Q. And how long was he there?

A. Maybe ten minutes or so—fifteen.

Q. Did you talk with the attorney?

A. Did I talk with him?

Q. Yes.           A. No, sir.

Q. Did you carry on your interrogation while the attorney was there?           A. No, sir.

Q. You dropped that, didn't you? All of the officers dropped their interrogation, didn't they, while the——

A. Dropped it? [281]

Q. You discontinued your interrogation while the attorney was there, didn't you?

A. Well, the attorney was talking to Mr. Smith, so obviously——

Q. Well, can't you answer that, Mr. Harkabus? You discontinued your interrogation of Mr. Smith while the attorney was there, didn't you? (Pause.) You, yourself, didn't ask Mr. Smith any questions while the attorney was in there, did you?

A. I did not.

Q. Nor did any of the other officers, did they?

A. No, sir.



(Testimony of Edward J. Harkabus.)

Q. Now, the attorney asked Mr. Smith, "Do you want me to represent you," didn't he?

A. He did.

Q. And what did Mr. Smith say?

A. He asked him who had sent him.

Q. And who did the attorney say had sent him?

A. He said that his father, Oscar Smith, I believe his name is.

Q. Oscar Smith, the defendant's father, had sent him, Harris, down there, is that right?

A. Yes, sir.

Q. And what else was said?

A. When he asked Mr. Smith if there was anything that he could do for him, Mr. Smith replied, the defendant replied, that he didn't think so because he had in fact been implicated in [282] this situation and had confessed his complicity.

Q. Smith hadn't signed anything as yet, had he?

A. No, sir.

Q. So, the attorney left, didn't he?

A. There was a few more words between Smith and his attorney.

Q. Well, then the attorney left, didn't he?

A. Yes, he did.

Q. How—did it take ten minutes for all that to occur? A. Well, that is my recollection.

Q. Did anyone tell Mr. Smith that he could go out and see his attorney in private if he wanted to?

A. His attorney said, "Do you want to talk to me in private, Mr. Smith," and Mr. Smith replied, "No."

(Testimony of Edward J. Harkabus.)

Q. Was his attorney sitting down or standing up?      A. He was standing up.

Q. And did the jailer make any remark to Smith about his rights?

A. Not to my recollection, no, sir.

Q. Did you tell Smith, "Go ahead, Smith, you can see your attorney if you want to"?

A. No, sir, I didn't.

Q. Did Pass do that?

A. I don't believe so.

Q. Or, did Trafton?

A. No, sir. He had previously been advised of his rights.

Q. Now, after the attorney Harris left, what then happened in [283] the interview room?

A. We continued to interview Smith for a short time.

Q. That went on for probably an hour and a half, or two hours afterwards, didn't it?

A. I don't believe so, no, sir.

Q. The result of this interview was that Mr. Smith signed some of these things you had been writing out in longhand, didn't he?

A. No, sir.

Q. Now, we get down to the point; didn't you have Mr. Smith sign some of those pages that you were writing on in your own handwriting in long-hand?      A. I didn't, no, sir.

Q. You didn't? Who did?

A. Nobody did, to my knowledge.

Q. Nobody did? (Pause.) Is it your testimony

(Testimony of Edward J. Harkabus.)

that nobody had Mr. Smith sign something written in longhand there that day in that room?

A. That's my recollection, no, sir.

Q. Well, could anyone have had him sign something written in longhand there at that time without your knowing it? A. I doubt it.

Q. Then, in all probability your testimony is, is it not, that he didn't sign anything written in longhand there that day?

A. My recollection is that he did not. [284]

Q. How did this statement that has been offered as Exhibit 20 get to be typewritten?

A. I typed it.

Q. Where did you type it?

A. In the King County Sheriff's office.

Q. When?

A. Immediately after the interview with Smith.

Q. Was Mr. Smith with you at the time you typed it? A. I don't believe he was.

Q. Did you do all the typing yourself?

A. Yes, sir.

Q. Was Officer Pass and Trafton with you when you typed it? A. They were.

Q. And that would be the same day, Sunday?

A. Yes, sir.

Q. And when was it taken to Mr. Smith—was it taken to him? A. Yes, sir, it was.

Q. Where was he when it was taken to him?

A. I believe he was in the jail.

Q. The three of you took it to him up to his cell?

A. No, not to his cell.

(Testimony of Edward J. Harkabus.)

Q. Did you call him out of his cell?

A. I didn't, no, but he had been called out.

Q. Where was he called down to—where was he called?

A. He was called to the same place where the interview was [285] conducted there.

Q. And about what time of the day would that be?

A. I honestly don't know.

Q. Well, would it be late in the evening?

A. No, sir.

Q. Early in the evening? Was it before you had had dinner?

A. Oh, yes; in fact, it was in the afternoon.

Q. In the afternoon? And it was signed in the same interview room then, was it, that you had been in previously that afternoon with Mr. Smith?

A. I believe so, Mr. Nesbett.

Q. Did you say that you had read the statement over to Mr. Smith?

A. Yes, sir.

Q. Did you read it in its entirety to him?

A. Yes, sir.

Q. And I believe you also testified that he, himself, read it?

A. Yes, sir.

Q. Did he read it over page by page?

A. I am sure that he did, yes, sir, because he initialed several corrections on it.

Q. Were you there watching him to see that he read it all?

A. Yes, sir.

Q. Have you still got those notes you made?

A. That's a difficult question to answer for this reason: that [286] recently I was involved in a fire

(Testimony of Edward J. Harkabus.)

in Fairbanks, your Honor, where many of my records and what-have-you were water-damaged and fire-damaged and, very honestly, I don't know; it may be in salvage records, yes, sir.

Q. Well, you don't know whether your notes were destroyed in that fire or not, is that right?

A. That's right.

Q. Didn't you—don't you, as a rule, turn your notes in with your—with the statement?

A. Well, generally, I don't, no, sir.

Q. To whom did you give the statement then after it had been signed?

A. Well, it was given to Trafton and Pass.

Q. Did you keep a copy for yourself?

A. No, sir, I don't.

Q. And you don't know what happened to your notes?

A. Well, I am not sure of what happened to them, Mr. Nesbett.

Q. I am looking at Exhibit 20 for identification, Mr. Harkabus. I wonder if I could see the original? My photostat doesn't show very well. May I approach the witness, your Honor?

The Court: Yes, you may.

(Thereupon, Mr. Nesbett approached the witness.)

Q. (By Mr. Nesbett): Now, Mr. Harkabus, is this the statement that you typed, Exhibit 20? [287]

A. Yes, sir.

Q. You typed that yourself?



(Testimony of Edward J. Harkabus.)

A. Yes, I did.

Q. And you say you had Mr. Smith sign each page of it himself?

A. Yes, sir. I didn't have him sign it; he signed it.

Q. He signed it? A. Yes, sir.

Q. And in the presence of Trafton and Pass?

A. Yes, sir.

Q. Now, this was taken on a Sunday—that would be the 17th? A. Yes, sir.

Q. Do you know how the date 3/16/57 came to be written on the copy of this statement?

A. Do I know how?

Q. Yes. A. No.

Q. Where is that copy (talking to other defense counsel)? On the photostat that I got off the copy, there is handwritten the date "3/16/57."

Mr. Plummer: I don't think I have anything on that.

Q. (By Mr. Nesbett): I am showing you a photostatic copy of Exhibit 20 which was made during the noon hour, Mr. Harkabus. Do you see those figures up in the righthand corner "3/16/57"?

A. Yes, sir. [288]

Q. Do you recall those figures being written in on any copy of this Exhibit 20? A. I do not.

Q. You have no idea how they might have gotten there?

A. You have the original. That is the one I typed. I know nothing about the photostat, Mr. Nesbett.

(Testimony of Edward J. Harkabus.)

Q. The point I am making, Mr. Harkabus, this is a photostat copy that was given to us by the District Attorney and the figures are photostated as well as the typing. I was wondering if you knew how——

A. No, sir.

Q. How many statements were signed by Mr. Smith on that date?

A. I believe there might have been three copies.

Q. Of four pages each?

A. Yes, sir.

Q. And did you have him sign all three copies?

A. I believe he did sign all copies, yes, sir.

Q. And you deny vehemently, didn't you say, that he signed any of your handwritten statements or notes?

A. My testimony was that I don't recall that he signed any notes. I don't recall him signing my notes.

Q. Didn't you have him sign your notes, or what you had been writing out shortly after Attorney Harris had left the room and then later take these others in and tell him that they were just type-written copies of the statement he had already [289] signed?

A. Oh, no, sir.

Q. You didn't?

A. No, sir.

Q. Do you recall Officer Pass, during the interview on Sunday, speaking to Mr. Smith and saying, "You better make a statement"?

A. No, sir.

Q. You don't recall that early part of the interview?

A. I don't recall it.

Q. Do you recall Officer Pass later saying, "If

(Testimony of Edward J. Harkabus.)

you go ahead and make the statement it will go a lot easier with you"—just prior to Mr. Harris being announced?

A. Well, my recollection of anything along that line is this, Mr. Nesbett——

Q. Well, I'd like to have you answer that question.

A. Will you rephrase your question?

Q. I will have it read back to you.

(Thereupon, the Court Reporter read back the question on line 10 above.)

A. Your Honor——

The Court: This is cross-examination. You should answer the question yes or no.

A. Well, I'd say "no" then.

Q. (By Mr. Nesbett): Why did you hesitate? [290]

A. Well, I hesitated because that isn't what was said.

Q. What did Officer Pass say to him in connection with making a statement?

A. Officer Pass indicated to him that based on past experience, in the event that he made a statement and a full confession, undoubtedly, it would go easier with him. That was the full context of the remark made by Officer Pass.

Q. That is the context of what Officer Pass said, is that right?

A. I believe that is right, sir.

(Testimony of Edward J. Harkabus.)

Q. In other words, he said that in gist as best you recall?      A. Yes, sir.

Q. You don't recall exactly what he said, do you?

A. No.

Q. You do not?      A. No, sir.

Q. Mr. Harkabus, now, going back to Saturday afternoon at about 4:45, about fifteen minutes after you had arrived at the King County jail, or approximately that time——

The Court: Pardon me. My understanding was, it was on a Friday.

Mr. Nesbett: I'm sorry, your Honor, that is right; the testimony was Friday. I am glad your Honor reminded me.

Q. (By Mr. Nesbett): Are you sure it was a Friday or Saturday?

A. It was a Friday. [291]

Q. It was a Friday?      A. Yes, sir.

Q. Did you see Mr. Smith at all on a Saturday?

A. I did not, no, sir.

Q. All right. Now, on Friday afternoon at about 4:45, or approximately fifteen minutes after you had arrived at the King County jail, you were in the room with Mr. Smith, that is right, isn't it?

A. Yes.

Q. And you had an opportunity to ask him two or three questions, is that right?

A. I asked him several questions.

Q. And then you left the room, is that right? Approximately half an hour after you had gone in?

(Testimony of Edward J. Harkabus.)

A. Well, it may have been longer. I am not positive.

The Court: What's the purpose of going all over this the second time, counsel?

Mr. Nesbett: Just laying the groundwork for one question, your Honor, that has been suggested to me and I couldn't ask the question out of the blue.

The Court: I appreciate that, but on the other hand, I thought I had the right to determine why you were going over that again.

Mr. Nesbett: Yes, sir. [292]

Q. (By Mr. Nesbett): Now, so after you had been in the room approximately thirty minutes, you left, is that right, Mr. Harkabus? A. Yes, sir.

Q. And to the best of your recollection you didn't go back, did you?

A. I don't believe I did, no, sir.

Q. And you don't know what happened or how long they were in the room after you left, do you?

A. Well, they weren't in there too long. I do know that because Lt. Wayland had to close his office.

Q. How do you know whether or not they were in there very long after you left?

A. Well, I was still at the King County jail. I testified to that, that I was in another room, in the chief deputy's room.

Q. Well, all right. If you are so aware and informed of the situation, how long were they in there after you left? A. I don't know.

Q. You don't know?



(Testimony of Edward J. Harkabus.)

Mr. Nesbett: That is all.

The Court: Very well. Any redirect, counsel?

EDWARD J. HARKABUS

testifies as follows on [293]

Redirect Examination

By Mr. Plummer:

Q. When did you next see——

Mr. Kay: Could I have a chance on cross? I just wanted to ask one question along that line?

EDWARD J. HARKABUS

testifies as follows on

Cross-Examination

By Mr. Kay:

Q. On Saturday then, I don't want to be repetitious at all, you didn't see Smith at all on Saturday?

A. I did not.

Q. Do you know whether Pass and Trafton did?

A. I believe they did.

Q. You don't know how long they saw him or what was said, of course, not being there on Saturday?

A. I wasn't there.

Mr. Kay: All right.

Mr. Plummer: Anybody else?

The Court: Now, you may proceed then.

EDWARD J. HARKABUS

testifies as follows on

Redirect Examination

By Mr. Plummer: [294]

Q. Did you, in fact, see Officer Pass and Lt. Trafton after you had left the cell or the interrogation room, or the defendant Smith after they were conducting their investigation on Friday afternoon?

A. I saw them, yes, sir.

Q. When did you see them?

A. I am not absolutely sure of the time, but I believe it would have been around six or so.

Q. And where? A. 6:30—around 6:30.

Q. Where did you see them?

A. Well, I believe it was in the office of Lt. Wayland of King County sheriff's office.

Q. So, they were at least out of there by the—about the time you mentioned?

A. I believe they were.

Q. Now, did Mr. Nesbett show you this copy with the "3/16/57" on it? A. He did.

Q. And it was your testimony you didn't know anything about it?

A. I didn't know anything about the photostat at all.

Mr. Plummer: I have no further questions.

The Court: Very well, you may step down.

Mr. Nesbett: May I ask one question, your Honor? It wasn't elicited by the redirect. I was wondering if your Honor [295] would give me per-

(Testimony of Edward J. Harkabus.)

mission to ask it in any event. It's based on the direct testimony.

The Court: Yes.

### EDWARD J. HARKABUS

testifies as follows on

#### Recross-Examination

By Mr. Nesbett:

Q. Mr. Harkabus, I believe you said the defendant was arraigned in Seattle, did you?

A. Yes.

The Court: No.

Q. (By Mr. Nesbett): Did you say that——

Mr. Nesbett: I understood him to say he was.

A. He was.

Q. (By Mr. Nesbett): Well, that is where I was confused. He was arraigned in Seattle?

A. He was arraigned in Seattle.

Q. And on what day?

A. I believe it was the 18th.

Q. Were you present at the time?

A. I was—I believe the Commissioner requested——

Q. Were you present when—— [296]

A. Yes, sir.

The Court: To refresh your recollection, Mr. Nesbett, the testimony was he was arraigned here in Anchorage, before Warren Colver.

Mr. Nesbett: On March 21st?

The Court: Yes.

(Testimony of Edward J. Harkabus.)

Mr. Plummer: There was also testimony, your Honor, that he was arraigned, by this witness, that he was arraigned in Seattle on the 19th.

The Court: I didn't hear it.

Mr. Nesbett: I believe I better clarify——

The Court: Well, the record will speak for itself. It was my recollection that he was——

Mr. Plummer: After arrival back to Anchorage, but he was arraigned in Seattle. I believe the witness testified he was arraigned on the 19th of March in Seattle, prior to his departure from Seattle.

Q. (By Mr. Nesbett): Was that a Monday?

A. It was a Monday.

Q. That would be the 18th. Which Commissioner was he arraigned before?

A. John Burns, U. S. Commissioner in Seattle.

Q. John Burns? A. Yes, sir. [297]

Q. You were present? A. Yes.

Q. Was the——was any charge read to the defendant? A. Yes.

Q. What was the charge?

A. Uttering a forged instrument, I believe.

Q. There was a Complaint then in existence at that time?

A. I believe there was, Mr. Nesbett.

Q. That Complaint was read, was it?

A. Yes, sir.

The Court: He was represented by an attorney at that time?

Q. (By Mr. Nesbett): Harris was there then, wasn't he? A. Yes, sir.

(Testimony of Edward J. Harkabus.)

Q. And had extradition already been taken care of?

A. At that time, my recollection is that Mr. Smith's attorney, John Harris, made a motion to quash the waiver of extradition executed by Mr. Smith.

Q. Was the motion argued?

A. It was set for the 19th at 1:30 p.m.

Q. And when was the waiver of extradition signed? You were present when that was signed, weren't you?

A. No, sir.

Q. Weren't you? [298]

A. No, sir.

Q. Well, did Pass and Trafton take care of that?

A. I assume that they did.

Q. That was done on a Saturday, wasn't it, the day you weren't there?

A. Well, I don't know. I believe it was. Efforts were made to arraign him on that same date, according to Mr. Pass.

The Court: Now, what same date?

A. On the—it would have been on the 16th, your Honor.

The Court: I see.

A. I don't know that of my own knowledge. All I know is what I was informed.

Mr. Nesbett: That is what I was going to ask. I ask that it be stricken and your Honor disregard it. It's strictly hearsay. If Pass can take the stand and say that under oath, all right.

The Court: You asked the question, did you not?

Mr. Nesbett: No, I didn't; your Honor did.



(Testimony of Edward J. Harkabus.)

The Court: Read the record back.

(Thereupon, the Court Reporter read back lines 4 through 12 above.)

The Court: The Court didn't ask the question, you see.

Mr. Nesbett: Very well.

The Court: Let's take a recess. We have been in session well over an hour now. I would suggest, Mr. Johnson [299] (the Court Bailiff), that you have the jurors come in and take their places in the courtroom. How long do counsel think this might go on?

Mr. Plummer: We have two short witnesses and one witness that will be fairly lengthy and not as lengthy as Mr. Harkabus, however.

The Court: Well, now as to the fact that Mr. Pass and Lt. Trafton aren't here, won't counsel stipulate that they're not here and available?

Mr. Nesbett: Stipulate that they're not here?

The Court: Well, no, that they're not available.

Mr. Kay: I don't know that they're not available. The United States Attorney's office can subpoena a witness anywhere in the United States. I don't know whether they're inside the jurisdiction or not.

The Court: I don't know either, but I was hoping to conserve time on that basis. If you won't, of course, we will have to go along with it, but I assume that something of that nature you would

(Testimony of Edward J. Harkabus.)

know of your own knowledge and you'd be willing to stipulate to it.

Mr. Nesbett: I don't know, your Honor, and I am certainly not in a position to waive anything.

The Court: Very well, court will go into recess for a period of ten minutes.

(Thereupon, following a short recess, the court [300] reconvened, and the following proceedings were had out of the presence of the jury and the spectators:)

The Court: Were you through with this witness, Mr. Nesbett?

Mr. Nesbett: Yes, your Honor.

The Court: Very well. Mr. Kay?

### EDWARD J. HARKABUS

testifies as follows on

#### Recross-Examination

By Mr. Kay:

Q. Just a few questions, your Honor. Mr. Harkabus, this proceeding in Seattle that occurred on Monday there, are you sure that was an arraignment or is it possible that it was a hearing on this question of extradition or something?

A. It was an arraignment.

Q. Do you recall if the bond was set?

A. It was \$10,000.00, at my recollection.

Q. Was there a Complaint there present in Seattle that was read at that arraignment?

(Testimony of Edward J. Harkabus.)

A. I believe there was, Mr. Kay.

Q. Were you present throughout the proceeding?

A. I was in the back portion of the Commissioner's Court. They indicated that they wanted us up there and I didn't know [301] exactly—(pause).

The Court: You may continue, Mr. Kay.

Q. (By Mr. Kay): You are, of course, aware of the difference between an arraignment and a—or, know what an arraignment is, do you not, Mr. Harkabus?

A. Yes, I do.

Q. From where you were standing in the courtroom, could you hear everything that went on in regard to the proceedings?

A. I believe I could hear it.

Q. Can you recall what went on?

A. It was an arraignment; that is my recollection and the bond was set and the defendant was informed of his rights and so forth. He was represented by an attorney at that time, Mr. Kay.

Q. And that attorney immediately raised the question, did he not, of extradition, and made this motion to quash the waiver of extradition that had previously been signed?

A. He did.

Q. And a date was set the following day or two days later for a hearing on that motion?

A. It would have been the 19th which was the subsequent date at 1:30 p.m.

Q. And then it's your testimony that the defendant was again arraigned here in Anchorage? [302]

A. Well, that—I think that your best record would be your Commissioner of Court records.

(Testimony of Edward J. Harkabus.)

Q. You don't know of your own knowledge whether he was arraigned again?

A. I'd been informed that he was, yes, sir.

Q. But of your own knowledge?

A. No, sir.

Q. Then you wouldn't be aware of any reason why he would be arraigned twice, if he was in fact arraigned twice?      A. No.

Q. Where did this proceeding take place? Was it in the same building as the jail?      A. No, sir.

Mr. Kay: That is all the questions I have.

The Court: Mr. Plummer, any redirect?

Mr. Plummer: No, your Honor.

The Court: Mr. Hepp?

Mr. Hepp: No questions.

The Court: Very well, then, you may step down, Mr. Harkabus.

(Thereupon, the witness left the witness stand.)

The Court: You may call the next witness.

Mr. Plummer: I would ask that the Court take judicial notice of its own files and see that on the Held to Answer papers that a Complaint was filed against this defendant on March 14, [303] 1957, and that the warrants did issue on that date.

The Court: Very well, motion is granted.

Mr. Kay: Just to satisfy my curiosity, would the Court file there also reveal the date of an arraignment here in Anchorage, Alaska?

Mr. Plummer: It does reveal.

The Court: You say "it does"?

Mr. Plummer: It does. The Held to Answer transcript that came up revealed what day he was arraigned and by whom. The reason I am sure is because I looked at the Commissioner's copies over the noon hour.

The Court: Mr. Kay, I point out to you that there is a Complaint signed the 14th day of March, 1957, by William T. Plummer and also by Warren C. Colver, Deputy United States Attorney (meaning Deputy United States Commissioner) in the file and bond set at \$10,000.00 on that date, and also——

Mr. Kay: That is a bond endorsed on the Complaint, is it?

The Court: That is correct. Then the commitment pending trial is signed on the 21st day of March; bail fixed at \$10,000.00.

Mr. Kay: Does the transcript here in this file show anything of the arraignment in Seattle?

The Court: Could you help me, Mr. Plummer?

Mr. Plummer: The transcript I saw down in the [304] Commissioner's Court over the noon hour did not mention any arraignment in Seattle.

Mr. Kay: That is all.

The Court: Very well. You may call your next witness.

Mr. Plummer: I'd ask that Jim Barkley be called.

The Court: For the record of counsel it shows that a warrant for Charles Edward Smith was issued the 14th day of March, 1957, and he was arrested at Seattle, Washington, on March 15, 1957. That may help you. You may proceed, counsel.



JAMES H. BARKLEY,

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Plummer:

Q. Would you please state your name, sir?

A. James H. Barkley.

Q. Your occupation?

A. Territorial Police Officer.

Q. And where are you stationed, sir?

A. Fairbanks, Alaska.

Q. Do you know a Lt. Trafton in Fairbanks, Alaska?

A. Yes, sir.

Q. And do you know—what is his occupation?

A. He is my commanding officer in Fairbanks detachment. [305]

Q. Do you know where he is at this time?

A. Japan.

Mr. Plummer: I have no further questions.

The Court: You may cross-examine.

JAMES H. BARKLEY

testifies as follows on

Cross-Examination

By Mr. Kay:

Q. Is he on vacation?

A. Yes, sir.

Q. When did he go?

A. I don't know the exact date. It's been approximately two or three weeks.

(Testimony of James H. Barkley.)

Q. You don't actually know, personally, that he is in Japan? I mean, you haven't seen him there?

A. No.

Q. You just know he is supposed to be in Japan?

A. That is correct, sir.

The Court: Any other cross?

JAMES H. BARKLEY

testifies as follows on

Cross-Examination

By Mr. Nesbett: [306]

Q. Is he still employed by the Territorial Police?

A. Yes, sir.

Q. Is he coming back to work in Fairbanks, or——

A. As far as I know, sir, yes.

Q. Have any charges been placed against him, to your knowledge, within the department?

A. Not to my knowledge, no, sir.

Q. Is he in command of the whole unit in Fairbanks?

A. Yes, sir.

Q. When is he expected back?

A. I don't know for sure what the length of his annual leave. I have heard it's the middle of April.

Q. How much annual leave do you officers ordinarily get with the department, Officer Barkley?

A. It varies; there's nothing—there's no set——

Q. Do you have thirty days of vacation a year or——

A. A year, yes, sir, thirty days annual leave per year.

(Testimony of James H. Barkley.)

Q. Has he been—did he leave the department three weeks ago, or, did you say he was in Japan two or three weeks ago the last you heard?

A. Left on his vacation.

Q. Two or three weeks ago? A. Yes, sir.

Q. And he will be back maybe in the middle of April?

A. To the best of my knowledge, yes, sir. [307]

Q. What is his rank? A. Lieutenant.

Mr. Nesbett: I believe that is all.

The Court: Any redirect?

Mr. Plummer: No, your Honor. I will advise the Court that I may call this witness on rebuttal. Of course, there is no way to anticipate, so I will ask that he be out of the courtroom.

The Court: Very well. You may be excused then.

(Thereupon, the witness left the courtroom.)

Mr. Plummer: Will you call Mr. Hibpshman?

### EARL W. HIBPSHMAN,

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

#### Direct Examination

The Court: You may proceed, counsel.

By Mr. Plummer:

Q. Will you please state your name, sir?

A. Earl W. Hibpshman.

Q. Occupation? A. Police officer.

Q. With the Anchorage City Police?

(Testimony of Earl W. Hibpshman.)

A. Yes, sir.

Q. What division? [308]

A. Detective Division.

Q. Do you know, sir, a Mr. Ted Pass?

A. Yes, sir.

Q. Is he still with the Anchorage Police Department?

A. No, sir, he is not.

Q. Do you know about when he severed relations with the police department?

A. Yes, sir, October 31, 1957.

Q. Do you know his present whereabouts?

A. I believe he is some place in North Carolina; I am not sure of the town, no, sir.

Mr. Plummer: I have no further questions.

The Court: You may cross-examine.

EARL W. HIBPSHMAN

testifies as follows on

Cross-Examination

By Mr. Nesbett:

Q. When did you last hear of Mr. Pass?

A. Sir, I have not heard of Mr. Pass since three or four days before his dismissal.

Q. How did you happen to know that he is in North Carolina?

A. Only by being told; I have seen no correspondence, sir.

Q. Is he confined in a mental institution there in North Carolina?

A. No, sir, not that I know of. [309]

(Testimony of Earl W. Hibpshman.)

Q. Has he been confined in any mental institution since he left the force, to your knowledge?

A. No, sir, not that I know of.

Q. Have you understood or heard that he has been?

A. No, sir.

Q. Do you know why he left the force?

A. Yes, sir.

The Court: Well, that is irrelevant and immaterial. He is not on trial.

Mr. Nesbett: Very well, your Honor.

The Court: Any other cross? You may step down then.

Mr. Plummer: No further questions.

(Thereupon, the witness left the witness stand.)

The Court: You may call your next witness.

Mr. Plummer: Call James E. Chenoweth. Just open the door. He is down in the Marshal's office.

JAMES H. CHENOWETH,

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Plummer:

Q. Will you please state your name, sir?

A. James H. Chenoweth.

Q. Occupation? [310]

A. Chief Deputy United States Marshal.



(Testimony of James H. Chenoweth.)

Q. I call your attention to, sir, to Criminal No. 3772, entitled *United States vs. James Ing and others*, and ask you, if you know, if a subpoena was issued for one Ted Pass, formerly with the city police, in regard to this cause?

A. Yes, sir, it was.

Q. And do you know, or if you know, will you tell us where this subpoena was sent and where it was served, if in fact it was served?

A. We sent the subpoena to the United States Marshal at Raleigh, North Carolina, for service upon Mr. Pass at Rocky Mountain, North Carolina.

Mr. Plummer: May I approach the witness, your Honor?

The Court: You may.

Q. (By Mr. Plummer): I ask you, sir, if you know whether or not the subpoena was served?

A. The Deputy Marshal at—in the area close to Rocky Mountain, North Carolina, went out to serve the subpoena on Mr. Pass. He did not serve it because Mr. Pass is under doctor's care at the present time. He wired the information to us and asked for instructions on the service of the subpoena, advising us in the same telegram that a physician's certificate would be forthcoming.

Q. Is that the telegram that you have there in front of you? [311]

A. Yes, sir, it is.

Q. Unless the Court or counsel want to look at it, or——

Mr. Kay: I'd like to inspect; I am not insisting that—but I would like to examine it.

(Testimony of James H. Chenoweth.)

(Thereupon, the document was inspected by Mr. Kay.)

Q. (By Mr. Plummer): And did you in fact receive such a certificate from the doctor?

A. Yes, we did.

Mr. Plummer: May I once again approach the witness?

The Court: You may do so.

Q. (By Mr. Plummer): I ask you, sir, if you can tell me what that is?

A. This is a letter from Dr. Stone which was sent to the United States Marshal at Raleigh, North Carolina, and he in turn forwarded it to us. This is the doctor that has Mr. Pass under his care.

Q. And would you tell us what in effect the letter says?

A. The letter says that Mr. Pass had been under the doctor's care for a period of approximately two weeks; that he had had during that period of time two severe convulsions at home; that he was presently being treated by that doctor with Thorazine and Dilantin sodium in order to control these seizures and the doctor stated, in his opinion, it would be inadvisable for the witness to undertake a trip to [312] Alaska at this time.

Mr. Plummer: I don't intend to offer this. I will show it to counsel. If they want me to, I will make such an offer.

The Court: Very well. Any cross-examination?

Mr. Nesbett: No questions.

Mr. Kay: No questions.

(Testimony of James H. Chenoweth.)

The Court: Very well. You may step down.

Mr. Plummer: May I give these to Mr. Chenoweth to return to his file?

The Court: They will be available in the event counsel needed them.

Mr. Kay: I wonder if I could just ask Mr. Chenoweth a question as he stands there?

JAMES H. CHENOWETH

testifies as follows on

Cross-Examination

By Mr. Kay:

Q. Have you been asked to serve a subpoena on Lt. William Trafton?      A. Yes, sir.

Q. Did you make any effort to do so?

A. Yes, sir. Lt. Trafton is either somewhere in Hawaii, Tokyo, or East. He's been on vacation, or, he's taking annual [313] leave for a period of about five weeks and nobody knows exactly where he is.

Q. When were you asked?

A. I'd have to check the records. It was sometime during the normal course of the issuance of subpoenas in this case.

Q. What's that, a week, two weeks ago?

A. I'd say approximately two weeks ago, anyway, if my memory serves me correctly.

The Court: Any redirect, counsel?

Mr. Plummer: No, your Honor.

The Court: Thanks, Mr. Chenoweth. You may be excused.

(Thereupon, the witness was excused and left the stand.)

The Court: You may call your next witness.

Mr. Plummer: I'd like to call Stanley Laird.

STANLEY H. LAIRD,

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

The Court: You may proceed.

Mr. Nesbett: Your Honor, before he commences to question Officer Laird, I object to any of the testimony. Officer Laird has sat here all through the trial and I don't think it's proper. I don't know what phase of the case or statement he intends to question him on, but I don't think it's proper. [314]

The Court: Objection overruled. He may proceed.

By Mr. Plummer:

Q. Will you please state your name, sir?

A. Stanley H. Laird.

Q. Your occupation?

A. Territorial Police Officer.

Q. And you, in behalf of your department, worked this case for the Department of the Territorial Police, is that correct, sir? A. I did.

Q. And I ask you, sir, if you recall right before the noon recess today extracting a copy of a statement allegedly taken from Charles Edward Smith from your file and handing it to defense counsel?

(Testimony of Stanley H. Laird.)

A. I did.

Mr. Plummer: And may I approach the witness, your Honor?

The Court: You may do so.

Q. Is this a copy of the statement that you gave him at that time? A. It is.

Q. I see what appears to be a longhand notation up in the upper lefthand corner of the statement saying "3/16/57." Do you see that?

A. Yes, sir.

Q. Do you know who put that on the original, which is not available now, or on the copy that you gave them?

A. I put it on myself. It was for filing purposes. That was [315] the weekend or so of Pass going to Seattle to locate Mr. Smith.

Q. You had no knowledge of when the statements were actually taken? A. No, sir.

Q. The "3/16/57" did not refer to that in any way? A. No, sir.

Q. Do you know the defendant in this case, Charles E. Smith? A. Yes, sir.

Q. Did you have occasion, sir, to see him on or about March 27, 1957? A. I did.

Q. And where did you see him, sir (Pause.) Where did you see him, sir?

A. I saw him at the federal jail. We picked him up, Detective Pass and myself, between 10:20 and 10:30 a.m. of that date.

Q. And what, if anything, did the three of you do?



(Testimony of Stanley H. Laird.)

A. We took Mr. Smith with us and, to substantiate his statement, took him about Anchorage and had him point out the various stores and where he had let off Mr. Volk, and just going over the points of his statement.

The Court: Counsel, that doesn't have anything to do with the admissibility of this statement, though.

Mr. Plumber: Subsequent to the two arraignments, after; he certainly had been advised of his rights. He now says that the statement is true and it was voluntarily given, if in fact I [316] can elicit from this witness that he did so testify.

The Court: Excepting this, that is not relative to the admissibility of this statement itself. That is the only thing we are trying. It might be to the trial itself, but not to the statement.

Mr. Plummer: My point, your Honor, was, and I probably expressed it very poorly, if sometime after he had been advised of his rights, if he in front of this witness said that the statement was true, (1); and that it was given voluntarily with no threats or promises made to him, that certainly would tend to show that at the time the statement was given that condition also existed.

The Court: Well, I anticipate, maybe not rightly, counsel for the defense are going to raise objection that the statement is inadmissible because he was not timely arraigned, so, therefore, that would have no bearing upon—and I haven't talked to counsel about it. It's just obvious from

(Testimony of Stanley H. Laird.)

the testimony, so, whether it was voluntarily, involuntarily, accurate, or inaccurate, is unimportant at this point.

Mr. Plummer: Very good, sir. Then, I will probably at this time not waste further time of the Court with this witness. I am trying to figure out how I can renew my motion without Mr.—for submission—without Mr. Harkabus being here.

The Court: Well, of course, you could do that without—he's properly identified it now.

Mr. Plummer: All right, I ask that Mr. Laird be [317] excused for the time being then.

The Court: Is there any cross, counsel?

Mr. Nesbett: I was going to ask Mr. Laird a question or two.

The Court: I though maybe you had——

Mr. Nesbett: As long as it was touched on.

## STANLEY H. LAIRD

testifies as follows on

### Cross-Examination

By Mr. Nesbett:

Q. How, in the course of your filing procedure, Sergeant, would you get—would you have occasion to mark on a report of that nature “3/16/57,” such as you mentioned?

A. That was from Ted, sir, Ted Pass' reports and so on and compiling them in the folder is just to get continuity of papers, that's all, just the week

(Testimony of Stanley H. Laird.)

ends and so on. I don't know the exact date the statement was taken. In other words——

Q. That is what puzzles me. You couldn't have received it before, say, the 20th or 21st, could you?

A. No, sir, and the papers were not always—they were held in abeyance and were not—in other words—put into the folder until we were ready to get the thing in——

Q. Did Officer Pass bring it up to you or did he mail it to you?

A. He gave it to me about a week or so after he returned. [318]

Q. Now, that is the point, Sergeant; how then, a week later, did you happen to write "3/16/57" on that statement?

A. I was just going by his daily report.

Q. Did you read a daily report? Did something in the report give you the idea that it was taken on the 16th?

A. It was just the period of time, sir, just the period of time that he had gone down to Seattle to contact Mr. Smith, or, arrest, Mr. Smith.

Q. Well, after you did write "3/16/57" on the statement then, where in your filing cabinets would you put it in order to be able to go back to it with respect to that date?

A. It's in my folder during the month or the week of—everything is listed in dates and by date and it was just as a figure of speech. I just took an arbitrary figure and, assuming it was on or about the 16th. I didn't know.

(Testimony of Stanley H. Laird.)

Q. Didn't you take the figure, though, that represents the date from Lt. Pass'—from whose records? Trafton's?

A. Lt.—or, it was Detective Pass'.

Q. Detective Pass' records; something you saw in his records made you write "3/16/57," wasn't there?

A. I was just assuming, sir; I was just assuming; I didn't ask him. I was filing the papers and getting them in continuity. That was all. The figure didn't mean anything at all.

Q. You have trouble going back and finding your files? [319]

A. No, sir.

Mr. Nesbett: That is all.

Mr. Plummer: I have no further questions.

The Court: You may step down.

(Thereupon the witness left the witness stand.)

The Court: Now, you may call your next——

Mr. Plummer: I, at this time, offer what has been marked for identification only as Plaintiff's Exhibit No. 20 into evidence.

The Court: Is there objection?

Mr. Kay: Yes.

Mr. Nesbett: Yes, your Honor, there is objection and I, of course, want to call the defendant as a witness with respect to the statement.

The Court: Very well, you may come forward, Mr. Smith, and take the stand.

## CHARLES E. SMITH

called as a witness for and on behalf of the defendant, and being the defendant, and being first duly sworn, testifies as follows on

## Direct Examination

Mr. Nesbett: As I stated, your Honor, Mr. Smith is being called simply for the purpose of determining the admissibility of this statement and no others.

The Court: That is in conformance with the practice. [320] You may proceed.

By Mr. Nesbett:

Q. Your name is Charles E. Smith, and you are a defendant in this case, are you not?

A. That is right.

Q. And you sat in court here throughout the trial?

A. Yes.

Q. Now, were you in Seattle on about March 15, 1957?

A. Yes, I was.

Q. Were you arrested on that date?

A. Yes.

Q. Now, will you—about what time of day were you arrested and where were you when it occurred?

A. I was at my folks' house. It's 115—no; 11815 78th South, and I would say it was around 3:00 o'clock.

Q. In the afternoon?

A. Yes.

Q. Do you recall what day it was?

A. I believe it was a Friday.

Q. Now, state what happened at the place at that time?



(Testimony of Charles E. Smith.)

A. I was just talking to someone on the phone and there was a knock on the door and my mother answered the door and somebody asked if I was there and she said "no," so they just pushed her aside and came in the house.

Q. Did you know who that was? [321]

A. I learned later it was the sheriff of Seattle.

Q. And did you learn later that his name was Wayland, or Weeland?

A. Yes, I did.

Q. Who else was with him?

A. I believe Detective Pass was, or, Marshal Pass.

Q. Do you recall any other persons who were with him?

A. No.

Q. Did you see Lt. Trafton?

A. Yes, I did.

Q. Well, was he with the sheriff?

A. Well, they was all together, but the only two to come inside the door was Mr. Pass and that sheriff.

Q. Now, where were you in the house at the time they came in?

A. I was right by the phone.

Q. Did either of those persons make any statement to you when they came thru, past your mother?

A. The sheriff said that I was under arrest.

Q. Did he tell you why you were under arrest or for what?

A. No, he didn't.

Q. Did the sheriff show you a warrant?

A. He didn't show me nothing.

(Testimony of Charles E. Smith.)

Q. Did you—were you ever presented with a warrant? A. No, I wasn't.

Q. What happened then?

A. Well, they took me down to Seattle Federal jail there. [322]

Q. I'll ask you this, before you go on with the story: did you see Mr. Harkabus there at that time? A. Yes, I did.

Q. Where was Mr. Harkabus?

A. He was with them.

Q. Did he come in the house?

A. Not in the house.

Q. Did he stay outside the house?

A. Yes, sir.

Q. Do you remember which door they came in?

A. They came in the back door.

Q. Was Mr. Harkabus near the back door, or do you know, when they went out?

A. When I come out, they was all right together there, real close.

Q. All right. Where were you taken?

A. Seattle Federal jail.

Q. Would that be the King County jail there?

A. I believe it would be.

Q. What was done with you there?

A. Well, I went in this sheriff's office there and Pass and I believe Harkabus and that sheriff was there.

Q. Was Lt. Trafton there?

A. Yes, Lt. Trafton, too.

Q. Are you sure Harkabus was there? [323]

(Testimony of Charles E. Smith.)

A. He was there right from the beginning.

Q. All right. What happened in this office?

A. Well, he started asking me questions about this M-K check deal.

Q. And did you give him any answers to those questions?      A. No, I didn't.

Q. How long were you in that office?

A. I'd say around three hours.

Q. And was Harkabus there during that period of time?

A. He was there right at the start.

Q. And how long did he remain there, if you recall?      A. Not too long.

Q. Did the others, any of the others, remain after Mr. Harkabus left?

A. Mr. Pass did and Mr. Trafton.

Q. Mr. Pass and Mr. Trafton remained?

A. Yes.

Q. During the entire three hours you say you were there?      A. Yes.

Q. What was being said and done in the office during those three hours?

A. They wanted me to sign, I don't know what they call it, but something saying they could take me back up to Alaska.

Q. Well, would it be something to do with extradition?      A. Yes. [324]

Q. Does that sound familiar?      A. Yes.

Q. Did you sign it?

A. Well, not at first, but——

Q. Did you eventually sign it?

A. I did; right at the end I signed it.

(Testimony of Charles E. Smith.)

Q. Now, did Mr. Pass or Mr. Trafton or Mr. Harkabus ever talk to you about your right to have an attorney, or in fact, did anything—that anything you said might be used against you?

A. No, they didn't.

Q. During that entire session?

A. No, they didn't.

Q. Are you positive of that?

A. I'm positive.

Q. Did they ask you to sign any written statements other than this extradition paper at that time?

A. No, they didn't.

Q. Did you, during the course of that interview, at the end of that three hours, make any admissions of your connection with the M-K matter?

A. No, I didn't.

Q. Where did you sign this paper in connection with extradition?

A. That was in the sheriff's office.

Q. Was that on the same day you were brought in?

A. Same evening, yes. [325]

Q. About what time in the evening did you sign it?

A. That must have been around 6:00—6:30.

Q. Did you know what you were doing when you signed that paper? Did you know the effect of it?

A. All I know I wasn't going to get no sleep until I signed it, I guess, so I signed it.

The Court: Just answer the question now.

Q. (By Mr. Nesbett): Well, did you know the

(Testimony of Charles E. Smith.)

effect, what they expected to accomplish by getting your signature on that paper?

A. No, I didn't.

Q. Did you—did they mention something about bringing you back to Alaska in connection with the paper?

A. I believe Detective Pass said he was going to bring me back to Alaska.

Q. Did you know that signing that paper would permit him to bring you back without legal proceedings? A. I didn't then.

Q. You found that out later, did you?

A. Yes.

Q. Now, what—after you signed the paper, what was—what happened to you?

A. They took me back to my cell.

Q. And were you in a cell with other prisoners or alone? A. I was alone. [326]

Q. And how long were you in the cell there?

A. Well, that night—all that night and next day; I'd say about four days, I guess, altogether, four or five days.

Q. Well, you went in on a Friday, didn't you?

A. Yes.

Q. Were you in a cell all day Saturday the following day? A. Yes.

Q. And were you taken out at all during that day?

A. Detective Pass and Mr. Trafton, they come and talked to me.

Q. Where did they talk to you?



(Testimony of Charles E. Smith.)

A. There's a little room up there from the cell where, I don't know what they call it, something like an anteroom; everybody talks there.

Q. About what time of the day did they come to talk to you?      A. About around noon.

Q. How long did that talk last?

A. About an hour.

Q. What was the nature of that talk?

A. They was asking me a bunch of questions about this M-K checks.

Q. Did you at that time make any admissions or statements that would connect you with this M-K matter?      A. No, I didn't.

Q. What happened to you after that interview came to an end?

A. They took me back to the cell. [327]

Q. How long did you remain in the cell then?

A. Until Sunday.

Q. Until Sunday, and about what time Sunday?

A. I'd say around 12:30.

Q. Were you taken out at that time on that date?      A. Yes, I was.

Q. Where were you taken?

A. I was taken back to that room again, the anteroom.

Q. Did you see any people in that room?

A. There was Mr. Harkabus and William Trafton and Detective Pass.

Q. What happened in that room then?

A. Well, Mr. Pass told me that I better make a statement.

(Testimony of Charles E. Smith.)

Q. Well, is that all he said?

A. Well, he told me—he just told me.

Q. What was his attitude when he told you that you better make a statement?

Mr. Plummer: I object to what his attitude was.

The Court: Objection sustained. This is on direct examination.

Q. (By Mr. Nesbett): What was the occasion for Detective Pass telling you that you better make a statement? What were the circumstances under which he made the statement?

A. He told me that—when I first went in there, he told me [328] I better make a statement so he'd get back up North and wouldn't be down there too long.

Q. Well, did you make a statement right then?

A. No, I didn't.

Q. Was Harkabus taking any part in this conversation? A. Yes, he was.

Q. Was Lt. Trafton taking any part?

A. Very little.

Q. Now, how long were you in the room with those people? (Pause.) Approximately, on that date? A. I'd say around three hours.

Q. Around how long? A. Three hours.

Q. During the course of the time you were in that room, did any attorney attempt to visit with you? A. Yes, he did.

Q. About how long after you had been in the room did this happen?

A. I'd say around two and a half hours.

(Testimony of Charles E. Smith.)

Q. And how did you learn that an attorney was attempting to see you?

A. Well, the jailer there, he came in the room there and said there was an attorney out there to see me.

Q. And did you or anyone in connection with this interrogation make any remark? [329]

A. Mr. Harkabus, he said that he could see me when he got done with me.

Q. Do you know who Mr. Harkabus was talking to when he said that?      A. The jailer.

Q. Did the jailer make any remark to Mr. Harkabus?      A. Not at that time, he left.

Q. Did you learn that the attorney made later attempts to see you?

A. The jailer come in again, oh, I'd say around fifteen minutes.

Q. And what did the jailer say on that occasion?

A. He said that I had a right to see an attorney and an attorney was wanting to see me.

Q. Did Mr. Harkabus, Lt. Trafton, or Detective Pass make any remarks at that time?

A. Mr. Harkabus, he said they was about done, that he'd see me in a few minutes.

Q. Did the jailer make any statement at that time?      A. He left him in.

Q. Now, did the jailer make any other remarks in connection with you in seeing your attorney?

A. He did say that I had a right to see him, or that he said—he was talking to Mr. Harkabus when

(Testimony of Charles E. Smith.)

he said this, he said "he has a right to see his attorney"; that's all he said.

Q. Who said that? [330] A. The jailer.

Q. Was he talking to Mr. Harkabus?

A. He said it at Mr. Harkabus.

Q. Was that before or after Mr. Harkabus said, "The attorney can see him when we get through with him"? A. That was afterwards.

Q. Now, did you in fact see your attorney there-after?

A. Oh, about ten minutes later, he was standing right in the doorway there.

Q. Now, during this ten-minute interval, the attorney appeared before—the attorney appeared. Did Detective Pass go out for purposes of talking to the attorney to your knowledge?

A. Not to my knowledge.

Q. Do you know who brought the attorney to the door when you saw him?

A. I know that he was with the jailer; that is the only one I know that he was with.

Q. Did he come inside the room very far?

A. No, just to the doorway.

Q. And did the attorney make any remark when he came to the door?

A. He asked me if there was anything that I wanted to see him about.

Q. Did the jailer make any remark prior to the attorney's statement? Did the jailer announce the attorney or did [331] he——

A. Oh, yes, he—when he come up there, he said,

(Testimony of Charles E. Smith.)

“This is Mr. Harris” and my dad had sent him down for me.

Q. Did Mr. Harkabus, or Mr. Pass, or Mr. Trafton make any statement in response to the statement of the jailer? A. None then.

Q. Were you all sitting down?

A. All but Mr. Trafton; I believe he was standing.

Q. Did any of those three people you were with in the room make any statement when the jailer said, “Here’s the attorney that your father sent down”? A. No, they didn’t.

Q. The attorney then made the statement to you that, was there anything he could do for you, is that right? A. Yes.

Q. Did you—were you still at the table or sitting down, rather? A. Yes.

Q. Were you sitting at the table with Harkabus as he testified? A. Yes, I was.

Q. Did—what did you say, if anything, to the attorney then? A. I said, “No, there wasn’t.”

Q. Did you want to see your attorney, or the attorney at that time?

A. Well, I didn’t want to cause no trouble so I just—they [332] was just about over with, so I said, “no.”

Q. How long had you been in the room at that time?

The Court: It’s already been testified to, counsel.



(Testimony of Charles E. Smith.)

Mr. Nesbett: Was it two and a half hours, your Honor?

The Court: Yes.

Q. (By Mr. Nesbett): And how long had it been since your attorney had been announced?

A. I would say mighty close to a half hour.

Q. Why didn't you, or, rather, I'll ask you this: did Harkabus or any of them say, "Well, you can go out and talk to your attorney if you want to"?

A. No, they didn't.

Q. Did anyone tell you that you had a right to confer with that attorney in private?

A. No, they didn't.

Q. Had you signed anything up to that time?

A. No, I hadn't.

Q. Were you ready to sign anything?

A. Yes, I was.

Q. Now, Mr. Smith, did you in fact sign something that day?

A. Yes, I did.

Q. Do you know what you signed? What was it?

A. I signed a statement written up by Mr. Harkabus.

Q. How was it written up, if you recall? [333]

A. It was just written on plain paper.

Q. Was it written—typewritten or longhand?

A. It was just written in longhand.

Q. How long after your attorney, the attorney left did you sign this statement, approximately?

A. Right away.

Q. Was the statement already written up at that time then?

A. Yes.

(Testimony of Charles E. Smith.)

Q. Had Mr. Harkabus been writing then on the statement during this entire interview?

A. Yes, he wrote it all.

Q. Do you recall what was at the top of that statement?

A. Well, I thought it said that "this statement will not be used against you."

Q. Was that, to your recollection, was that statement written in handwriting on the top of the statement? A. Yes, it was.

Q. Had Harkabus been questioning you in connection with some fire loss in addition to the M-K matter? A. Yes, he was.

Q. Was any typewritten statement given to you on that day to sign?

A. There was a little later.

Q. I see. Was that the statement that has been presented to the Court here? [334] A. Yes.

Q. Where did you sign that statement, if you recall?

A. They brought me out of my cell and back in that room again.

Q. And about how long after the afternoon was it when your attorney called, was it, that they brought this other statement to you?

A. Oh, around an hour.

Q. Are you positive you had previously, however, signed the handwritten statement of Harkabus? A. Yes.

Q. Did you—were you told by Harkabus or any of them that you needn't make any statement if

(Testimony of Charles E. Smith.)

you didn't want to?           A. No, I wasn't.

Q. Were you told by them that prior to the commencement of the Sunday meeting that you were entitled to an attorney and needn't make any statement?           A. No, I wasn't.

Q. Why didn't you get up and demand to see your attorney at the time he stood in the door there and asked you if he could do anything for you?

A. Well, I already—the statement was just made out, you know, and everything was done but it was just signed and I didn't want to cause any trouble; it was just about over with.

Q. Did Detective Pass make any statement to you in connection [335] with what might happen to you if you went ahead and signed the statement and cooperated?

A. He told me if I would cooperate that he would see that it was known up here.

The Court: Mr. Nesbett, please don't lead the witness now; even if the Government doesn't object I will have to. I want to do the best I can for this defendant, but I don't want you to ask leading questions to determine that. Let this witness testify what is determined, please.

Q. (By Mr. Nesbett): Mr. Smith, about what time of the day then was it that you signed this typewritten statement?

A. I would say around five, something like that; maybe five-thirty. It would be hard to say.

Q. That was on a Sunday, was it?

A. Yes, it was.

(Testimony of Charles E. Smith.)

Q. What was then done with you?

A. After I signed?

Q. Yes.

A. I was taken back to my cell again.

Q. How long did you remain in the cell?

A. Well, until they called me up for, some place, to see about some extradition.

Q. Do you know where you were called and on what day it was that you were called? [336]

A. No, I don't.

Q. Well, what happened when you were called up this next time in connection with extradition?

A. Well, there was a room full of people there and Mr. Harris was there.

Q. Who is Harris? Was he the attorney?

A. My father got, yes, sir.

Q. What happened in that room full of people?

A. I guess they was talking about extradition because they never did ask me nothing. I just——

Q. Were any statements made to you in that room by anyone?

A. Not to my knowledge.

Q. Was there a judge, someone sitting there, an authority?

A. Yes, there was.

Q. At a desk?

A. Yes, there was.

Q. Did that person make any statement to you during that hearing?

A. Not to me.

Q. Did that person make any statement in connection with any charge against you?

A. No, he didn't.

Q. Well, what was the nature of the hearing?

(Testimony of Charles E. Smith.)

A. I believe it was extradition.

Q. What did Harris do there for you? Why was he there, do you know? [337]

A. Well, he was talking about something that they arrested me wrong or something like that, and they didn't give me no counsel or nothing like that. He was going to fight extradition.

Q. How long were you in the room?

A. Oh, about half an hour.

Q. Were you, during that time you were in that room, advised that—was a Complaint read to you charging you of having to do with these checks, forging them?

A. No, there wasn't.

Q. Did you sign anything in your room?

A. No, I didn't.

Q. What next happened to you?

A. Well, they took me back to my cell again.

Q. And how long were you in the cell that time?

A. Oh, I believe a day or—either one day or two days.

Q. Then what happened to you?

A. We got on a plane and came up to Anchorage.

Q. Where did you go in Anchorage?

A. They took me down to federal jail.

Q. When did you see anyone or have occasion to leave the federal jail after you had arrived?

A. Mr. Pass come and got me.

Q. And when, with respect to the time of your arrival?

A. Oh, about two days, I believe, something like that. [338]



(Testimony of Charles E. Smith.)

Q. Were you ever taken before a U. S. Commissioner here?      A. Yes, I was.

Q. Were you informed of the charge or complaint read to you?      A. Yes, I was.

Q. And were you advised of your rights on that occasion?      A. Yes, I was.

Q. Were you asked about preliminary hearing?

A. He just asked me if I wanted to waive it.

Q. What did you say?

A. I signed the slip and signed "yes."

Q. How long were you in the federal jail here before you were released on bail?

A. I'd say around ten days; I don't really know.

Q. Were you in jail during the time that these witnesses have testified that you rode around town with them, identifying the places that you——

A. Yes, I was.

Q. Have you read this typewritten statement that has been offered in evidence?

A. Yes.

Q. You did read it, didn't you?      A. Yes.

Q. Do you recall ever having read that full statement ever before?

A. The front first paragraph there is a little mixed up to my [339] notion.

Q. Is that your signature on the pages?

A. Yes, sir.

Q. When they took you out of your cell the second time on Sunday to look at that statement, I will ask you did you read that statement over in full before you signed it?

(Testimony of Charles E. Smith.)

A. I probably just glanced through it and just signed it to be done with it; that's all.

Mr. Nesbett: I believe that is all, your Honor.

The Court: Very well. You may cross-examine, Mr. Plummer.

CHARLES E. SMITH

testifies as follows on

Cross-Examination

By Mr. Plummer:

Q. Mr. Smith, was—did you testify in response to a question of Mr. Nesbett's, that the only way you would ever get any sleep was to sign a waiver of extradition?

A. Yes, I did.

Q. And what time was it of the day that you signed it?

A. I'd say around six.

Q. Six in the afternoon?

A. Six in the evening, yes.

Q. Do you usually go to bed before that time, do you? [340]

A. No.

Q. Now, did your attorney, that is, Mr. Harris, when he came to your cell there, did he—did you make any request to talk to him alone?

A. No, I didn't.

Q. Did he advise you that you could talk to him alone?

A. No, he didn't.

Q. Did anybody prevent you from making such a request?

A. No, they didn't.

Q. Were you frightened in front of Detective Pass and these people to request that?

(Testimony of Charles E. Smith.)

A. Well, it was all done; there was so much argument before that I thought, well, I better just do it and be done with it.

Q. Had they made any threats to you of any kind?      A. No.

Q. May I have Plaintiff's Exhibit No. 20? May I approach the witness, your Honor?

The Court: You may.

(Thereupon, the exhibit was handed to Mr. Plummer and he then approached the witness.)

Q. (By Mr. Plummer): I wonder, Mr. Smith, is that your signature there?      A. Yes, it is.

The Court: He so admitted that, counsel, if you so recall. [341]

Q. (By Mr. Plummer): I wonder if you'd just read that first paragraph.

A. (Reading): "I, Charles Edward Smith, residing at 11815 78th Avenue, South, Seattle, Washington, hereby make the voluntary signed statement to Special Deputy, United States Marshal Ted Pass, and Lt. William W. Trafton, Dept. of Territorial Police. I have been advised of my right to counsel, that I need not make a statement and any statement that I do make may be used against me in a court of law. No threats or promises, or any form of duress have been used to induce me to make this statement."

Q. Fine. Now, that as a matter of fact, you just said were your rights explained to you?

A. They never explained nothing to me. The

(Testimony of Charles E. Smith.)

first ones I signed there was four papers written up in his own handwriting.

Q. Well, you signed this, though, didn't you?

A. Yes, he brought this later.

Q. Well, did you—had anybody explained your rights to you?

A. No, they didn't, not at that time.

Q. Well, had they ever? You said in your statement that they did. Had they?

A. It says in this statement at the top of it, yes.

Q. Well, had they? A. No, they hadn't.

Q. Well, now, your attorney had been there. Did you tell him [342] that nobody had explained your rights to you?

A. He never said too much to me because he was arguing with Mr. Harkabus and Ted Pass for keeping him out.

Q. Well, you testified that he was in there, didn't you?

A. Yes, I did. He came in on his own.

Q. Did you ask him what your rights were, or tell him that your rights had not been explained to you? A. No, I didn't.

Q. And you didn't ask for a private appointment with him or anything like that?

A. No, I didn't.

Q. Well, if you were concerned about your rights that these people had been threatening you, would it be natural, sir, to assume that you would have mentioned it to him?

A. I just didn't know that.

(Testimony of Charles E. Smith.)

Q. This statement was typed and signed—typed and at least presented to you for signature after seeing your attorney? A. Yes, it was.

Q. Now, when did you first become acquainted with the nature of the charges against you, sir?

A. Well, he mentioned them Saturday.

Q. Now, on Saturday didn't they mention them to you at the time that they arrested you?

A. No, they didn't.

Q. What did you think they were arresting you for? [343] A. I had no idea.

Q. Did you inquire?

A. I asked them and they just smiled at me; they just went to their cars and that's it.

Q. They just smiled at you? A. Yes.

Q. I wonder if I could inspect the Court's file for just a minute?

The Court: You may.

(Thereupon, Mr. Plummer began to inspect the Court's file.)

Mr. Plummer: What I'm trying to find in here, your Honor, is the original return and—of the warrant.

The Court: I'm sorry; I can't help you, counsel.

Mr. Plummer: I don't even know whether they're kept in the file. I think it would be. (Pause.) I don't want to waste the time of the Court, but I am——

The Court: Well, you may be able to give it to



(Testimony of Charles E. Smith.)

the In-Court Deputy, maybe she could help you while you are examining on something else.

Q. (By Mr. Plummer): Now, was it your testimony, Mr. Smith, that at the time that the officers came to the house you were as a matter of fact in the house; that is, at your parents' home in Renton, Washington?

A. That they come in the house? [344]

Q. That at the time that they arrived there, that you were at home inside the house?

A. Yes, I was home.

Q. And where were you inside the house?

A. I was talking to him on the phone.

Q. They were outside at the door, though?

A. They was talking to me—see, they talked to me all the way up there. This fellow explained to me up there that they can talk to you right from the patrol car, so, they talked to me right at the last second.

Q. You are positive at the time that they knocked on the door that you weren't in the closet?

A. No.

Q. Had you just been in the closet?

A. No.

Q. Did you just go into the closet?

A. No.

Q. And is it your testimony, sir, that you were never arraigned while in Washington?

A. Not to my knowledge.

Q. Is your testimony that you have not—were not arraigned while in Washington, sir?

A. (Pause.)

(Testimony of Charles E. Smith.)

Q. Let me ask you, sir, if you ever appeared on February 21st, before a Mr.— [345]

The Court: You mean "March," don't you, counsel? It apparently is an undisputed fact that he was not arrested until March 15th, therefore, he could not have been arraigned in February.

Mr. Plummer: I am trying to—I am sorry, your Honor, I have the wrong document here. I am——

Mr. Nesbett: I think Mr. Plummer is looking at Walker's papers.

Mr. Plummer: I am—I was trying to make heads and tails out of it and I couldn't—that was probably the reason. May I have just one more minute, your Honor?

The Court: You may. Let's get the jury back down and excuse them. There is no use keeping them any longer, Mr. Johnson (Court Bailiff), please. It's now 4:30 and it's obvious that the balance of the day will be consumed in this problem. Could we start at 9:00 o'clock tomorrow morning? Tomorrow is naturalization ceremonies and we will not be able to start this trial until 10:30. The next morning the Court is committed at 8:00 o'clock for two hours on another problem. It looks like we will have to plan a night session as much as I dislike it.

(At this time, the jurors were brought back into the courtroom by the Court Bailiff.)

The Court: Let the record show all the jurors are back and present in the court. Ladies and gentlemen of the jury, this proceeding has taken consider-

(Testimony of Charles E. Smith.)

ably longer than [346] anticipated by counsel and the Court. It is obvious that we cannot conclude today, and, therefore, I do not want to keep you any longer. Without objection, then, you are now excused to report tomorrow morning at the hour of 10:30. Bear in mind, tomorrow morning we have naturalization ceremonies which this Court must conduct and we will not be able to resume the trial before 10:30, at the earliest. As you know, I must instruct you not to discuss this case among yourselves nor are you permitted to let others discuss it with you. You may now be excused. The Court will remain in session.

· (At this point, the jurors left the courtroom.)

The Court: Let the record show all the jurors are absent from the courtroom. You may now proceed, Mr. Plummer.

Q. (By Mr. Plummer): Now, Mr. Smith, do you deny that on the 19th day of March, you appeared before the Commissioner, a Mr. John A. Burns, down in Seattle and at that time you were accompanied by your attorney, Richard D. Harris, and that the Commissioner read the charge in the Complaint and explained it to you? Do you deny that at this time?

A. If he did, I don't remember.

Q. Do you deny that he did it?

A. There was so much junk going on there, I don't remember what the heck happened.

Q. Well, you remember apparently the last part

(Testimony of Charles E. Smith.)

of the proceeding, [347] I guess, from your testimony; was that right what happened after they finished reading the Complaint to you and advising you of your rights? Wasn't Mr. Harris along with you at that time?      A. Up in——

Q. In front of the Commissioner.

A. Yes, he was there. He did all the talking; in fact he did everything. I just sat at the desk.

Q. Did the Commissioner do any of the talking?

A. He was talking to Mr. Harris. I was sitting back with my dad and mother.

Q. Do you deny that the Commissioner read the Complaint to you and advised you of your rights on the 19th day of March, in the Commissioner's Court in Seattle, Washington?

A. The only thing they was arguing up there that I know was about that extradition.

Q. I ask the Court to take judicial notice of its own files and especially that item in the file marked "Record of Proceeding of Criminal Cases," the report of the proceedings in front of the United States Commissioner, John Burns, which is opened in the file. I have no further questions.

The Court: Motion is granted. You may proceed, Mr. Smith—or, Mr. Nesbett, on recross—or, redirect.

Mr. Nesbett: Could I see that file, your Honor?

The Court: Yes, I have marked it for your convenience. [348] Let's take a little recess.

Mr. Nesbett: I have no other questions, your Honor.

(Testimony of Charles E. Smith.)

The Court: Very well, then.

Mr. Kay: I would like to ask a question. I am not sure what my status is in asking.

The Court: That is the point. I was going to call your attention to it. I doubt if you would have the right, counsel.

Mr. Kay: Well, I certainly represent a separate defendant here who has an interest in this statement because there are some hearsay statements contained in the statement and I think I have a perfect right to inquire as to whether or not the circumstances—I only want to ask a couple of questions which may or may not be objected to; I don't know.

The Court: What is your position, Mr. Plummer?

Mr. Plummer: I have no objection.

The Court: Very well, you may proceed.

Q. (By Mr. Kay): Mr. Smith, you were sitting here in court this morning when Mr. Harkabus testified, were you not?

A. Yes, I was.

Q. Did you hear Mr. Harkabus state that at the jail on, I believe, Sunday, that Pass, Officer Pass, made the statement to you something like this: "Based on past experience, if [349] you make a full confession it will go a lot easier with you." Did you hear Mr. Harkabus so testify?

A. Yes, I did.

Q. Did Pass make such a statement to you, either that, or similar to it?

A. Well, made one similar to it.

Q. Can you recall what the gist of the statement



(Testimony of Charles E. Smith.)

or the exact words or close to the words that Pass used?

A. Well, he told me, I believe, that if I would cooperate, that it would go easier on me.

Q. Did Officer Pass' statement so made to you at that time influence you in any way in making your statement?

A. Well, I made it right after that.

The Court: Any redirect?

CHARLES E. SMITH

testifies as follows on

Recross-Examination

By Mr. Plummer:

Q. You had had a chance to see your attorney, Mr. Harris, of course, before making the statement and before signing the statement, hadn't you?

A. The statement was already made before I seen Mr. Harris.

Q. Typed and presented to you?

A. Pardon? [350]

Q. Was it typed and presented to you?

A. No, it wasn't.

Q. By the time it was typed up and presented to you and you finally got around to signing it, you had had an opportunity to see Mr. Harris?

A. Yes, I did.

Q. Fine.

The Court: Very well. You may step down.

(Thereupon, the witness left the witness stand.)

The Court: You may call your next witness, Mr. Nesbett. Did you have another question?

Mr. Nesbett: No, I have no other witnesses, your Honor.

The Court: Very well. Then I will hear argument of counsel.

Mr. Kay: We were about to take a recess. Let's take a short one before we argue.

The Court: I want to finish this up today, counsel, as you can see the need for it. How much time—five minutes? Will that be sufficient for you? The court will go into recess for a period of five minutes.

(Thereupon, following a short recess the following proceedings were had:)

The Court: For the sake of the record, I don't know whether it's necessary or not, but I at this time renew my offer [351] into evidence, Plaintiff's Exhibit No. 20.

The Court: Very well.

Mr. Nesbett: And I object to the admission in evidence, your Honor, upon several grounds \* \* \*.

(Thereupon, following argument presented by Mr. Nesbett, the Court sustained the objection. After remarks by Mr. Plummer, the following proceedings were had:)

The Court: Very well, the ruling of the Court will stand. The trial of this case will be continued

until tomorrow morning at the hour of 10:00 o'clock a.m. and this court will stand adjourned until tomorrow morning at the hour of 9:00 a.m. when this court will conduct naturalization proceedings.

(Thereupon, at 5:10 o'clock p.m., February 24, 1958, court was adjourned to the next morning, this case to be resumed at 10:30 o'clock a.m., February 25, 1958.) [352]

The Court: The Court will apologize to counsel, litigants, and to the jurors. As you know, we had naturalization ceremonies this morning; thereafter we were invited over to the Loussac Library for a cup of coffee put on by the Anchorage Women's Club. I feel it's the duty of the Court to support those people in their endeavors, the same as it is to be here in court all the time, and, as you know, we follow a rather strenuous and a rather rigid conduct of court work here, so it's nice to get away for just a few minutes. I hope you will understand.

Will counsel stipulate that all the jurors are back and present in the court?

Mr. Plummer: Yes, your Honor.

Mr. Kay: So stipulate.

The Court: Very well. You may call your next witness, Mr. Plummer.

Mr. Plummer: Before we do that, your Honor, I would like to forward to the bench a proposed instruction which has been submitted and receipted for by counsel.

The Court: Mr. Kay.

Mr. Kay: I would like also at this time, your

Honor, to hand up four proposed instructions on behalf of the defendant, James Ing, which have been served on the United States Attorney.

The Court: Thank you.

Mr. Kay: I may have others, of course. The situation [355] of the case is rather uncertain at the moment and we are prepared to argue at lease.

The Court: Mr. Johnson, I think it's unduly warm in here.

Deputy Clerk: Everyone has complained.

The Court: Suppose we did this, open up the doors for a just a moment. Maybe we could open up the back doors. Will you receipt these so we will have some time on them.

Mr. Plummer: I understand that Mr. Kay will have me sign for a copy of them so that it will be in order.

Mr. Kay: As long as the record shows they have been served on the United States Attorney's office I will later present a frontispiece for all of them. I didn't want Mr. Plummer to have to sign all of them.

The Court: Very well.

Mr. Plummer: Before we begin our proceedings, I do not see anybody in the courtroom that's a possible Government witness with the exception of Mr. Clifford Judd. He's been under subpoena, released from subpoena, but it may be necessary to call him again and for that reason I request that he absent himself from the courtroom.

The Court: Mr. Judd——

Mr. Kay: I'd like for the record to show that

this is the same witness that sat in court an hour at a previous day's hearing and I would, therefore, object in any event in accordance with the rule. I would merely not say I object; I merely call [356] the rule to the Court's attention. That occurred on—what was it? At the Log Cabin on Monday.

The Court: Mr. Judd, it's been requested that you be excused for the time being. Would you please absent yourself from the courtroom?

Mr. Plummer: I see nobody else, your Honor, in looking over the crowd that could be a possible Government witness. I think I know all of them by now. Is there anybody in the courtroom who is under subpoena from the Government? (No response.)

The Court: Very well. You may call your next witness then.

Mr. Plummer: I ask that the Bailiff call Mr. Eli Williams.

ELI WILLIAMS,

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

The Court: You may proceed, counsel.

By Mr. Plummer:

Q. Will you please state your name, sir?

A. Eli Williams.

Q. And where do you reside, sir?

A. Where do I reside?



(Testimony of Eli Williams.)

Q. Where do you live, sir? [357]

A. 18th Street.

Q. Do you have a street address or one that you use?

A. 1015.

Q. And how long have you resided there, sir?

A. About four years.

Q. Were you living there over the Labor Day week end of 1956?

A. Yes.

Q. And you have resided there continuously from that time until now?

A. Yes.

Q. Now, were you in the Anchorage area during the Labor Day week end of 1956?

A. Yes.

Q. And were you at the address just mentioned?

A. That's right.

Q. Do you know the defendant in this case, Raymond Wright?

A. Yes, I do.

Q. Did you have occasion to see Raymond Wright over the Labor Day week end of 1956 in Anchorage?

A. Yes, he was at my house.

Q. Would you tell me where you saw him, sir?

A. I saw him in my kitchen.

Q. And did he, that is, Raymond Wright, stay at your house over that week end?

A. Yes, he stayed at my house. I saw him a couple of times. [358]

Mr. Plummer: I have no further questions.

The Court: Any cross? (Pause.) Mr. Hepp.

## ELI WILLIAMS

testifies as follows on

## Cross-Examination

By Mr. Hepp:

Q. Mr. Williams, how long have you known Raymond Wright?

A. I have been knowing Raymond Wright about 20 years or longer.

Q. Has that been a business or just a social friendship?      A. Just friendship.

Q. Do you have occasion to see Mr. Wright frequently or at what intervals?

A. No, only when he comes in.

Q. Does he come down often?

A. No, he been—before the recent time he have come down a few times.

Q. Does he use—to your knowledge, does he stay at your place when he comes to Anchorage?

A. That is where he stays, live at my place.

Q. That is what you said?

A. Yes, that is where he lives, at my place, when he comes to Anchorage.

Q. How does he gain entrance to your place? I think you stated that you saw him in your kitchen? [359]

A. Well, he got the key to my house. He come there any time, if I don't be there or not.

Q. I see. Well, referring to this Labor Day visit, was there anything different in his stay than as in any other time that he came down and stayed at your place?      A. No.

(Testimony of Eli Williams.)

Q. Will you state, if you know, why he was down here then?

A. Well, I didn't know why he was down. He just come in when he comes in; he never did say anything; just visit me every time he come in and got the key and stay at my house, that's all.

Q. Did he do any act or have any meetings with anybody or furtiveness that caused you to believe that this was a different situation than other visits that he had made? A. No.

Mr. Plummer: Object.

The Court: What is your objection, Mr. Plummer?

Mr. Plummer: He first has asked his opinion. He asked, did he do anything furtive?

The Court: Did he what?

Mr. Plummer: —do anything furtive, or any meetings; completely outside the scope of the direct. If he wants to call Mr. Williams, as a witness, let him call him. It has nothing to do with the direct and can't in any way check this man's memory or anything else as to the events. [360]

Mr. Hepp: May it please the Court, I think the matter has come up here before as to a witness testifying if he knows something and I have objected on many occasions about laying a foundation to find out how a witness may know something and it's been consistently overruled, so I suppose that in this instance if he knows any of these things, he can testify; if he doesn't, he can say so.

Mr. Plummer: I will rely on the record. I will

(Testimony of Eli Williams.)

ask the Reporter to read back the question. If the word is "if you know"—if there is any question, I will withdraw my objection.

The Court: Very well. The Court Reporter may read the question asked by counsel for the defense.

(Thereupon, the Court Reporter read back the question on page 360, line 12.)

Mr. Plummer: I renew my objection.

The Court: Objection sustained.

Mr. Hepp: I will rephrase my question and ask you to answer it, if you know?

A. I know what?

Q. (By Mr. Hepp): If you know of your own knowledge, did Mr. Wright do any act, have any meetings, or display any conduct which caused you to believe that there was anything furtive or different in his visit this time, the time that we are referring to, over the Labor Day, than any other of the visits that he [361] had with you when he came to Anchorage?

Mr. Plummer: I object to this witness telling what he believed. He can tell what he saw and heard. I object to anything he might have believed.

The Court: Objection sustained as to his belief, but he may testify as to what he saw and heard.

A. Well, I didn't see anything with Raymond.

Q. (By Mr. Hepp): Nothing unusual about this visit at all? A. No.

Mr. Hepp: I have no further questions.

The Court: Any redirect, Mr. Plummer?

Mr. Plummer: No, your Honor.

The Court: Very well. May this witness be excused?

Mr. Plummer: As far as the Government is concerned, he may be.

The Court: Very well.

(Thereupon, the witness was excused and left the stand.)

The Court: Call your next witness.

Mr. Plummer: I ask the Bailiff to call Mr. Ronald W. Lovely.

RONALD W. LOVELY,  
called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on [362]

Direct Examination

The Court: You may proceed, counsel.

By Mr. Plummer:

Q. Will you please state your name, sir?

A. Ronald W. Lovely, L-o-v-e-l-y.

The Court: Thank you.

Q. (By Mr. Plummer): What is your present occupation and employment?

A. I work for Morrison-Knudsen.

Q. How long have you been employed by them, sir?

A. 15 years.

Q. And what is your capacity and job title with the company?



(Testimony of Ronald W. Lovely.)

A. My job title is administrative superintendent for Contract 1787.

Q. And what is the general type of work being done by your company under Contract 1787?

A. We are subcontractors for construction of certain military communications facilities in the Territory of Alaska.

Q. And were the operations under Contract 1787 taking place during the fall of 1956, sir?

A. Yes, sir.

Mr. Plummer: I ask that this be marked for identification.

The Court: It may be marked as No. 21. You have two, do you, counsel?

Mr. Plummer: Yes, sir. [363]

The Court: 21 and 22 then for identification purposes only.

Mr. Plummer: Would you make sure your tag doesn't cover this water mark there. May the record reflect that I am showing Plaintiff's Exhibits for identification only 21 and 22 to counsel.

The Court: Very well.

Mr. Plummer: May I have Exhibits 1 through 19.

(The exhibits were handed to Mr. Plummer.)

Mr. Plummer: May I approach the witness, your Honor?

The Court: You may.

Q. (By Mr. Plummer): Mr. Lovely, as supervisor of the administration project 1787, I'll ask you to look at Exhibits 1 through 19 and also at 21

(Testimony of Ronald W. Lovely.)

and see if you know the party whose signature purports to be in the lower right-hand corner, one Guy M. King?      A. Yes, I do.

Mr. Plummer: Your Honor, I see that Mr. Williams is back in the courtroom and although he's been on and off the stand, I wonder if he should be in here.

The Court: I don't know, counsel, because I don't know whether you intend to call him.

Mr. Plummer: We do not intend to recall him.

The Court: What's the position for counsel for the defense? [364]

Mr. Nesbett: Which Williams is that, your Honor?

The Court: The man that just testified.

Mr. Kay: We don't intend to call him.

The Court: Very well, Mr. Williams, you may remain in the courtroom then. Thanks for calling it to the Court's attention.

Mr. Plummer: Will you read back the last question I asked Mr. Lovely?

(Thereupon, the Court Reporter read back question line 13 and answer line 17, page 364.)

Q. (By Mr. Plummer): And did you know Mr. King when he was an employee of your company in 1956?      A. Yes, sir.

Q. And what was his capacity?

A. His capacity was site clerk.

Q. Would you tell us, if you know, what his

(Testimony of Ronald W. Lovely.)

authority was to draw checks on funds of the Morrison-Knudsen Company on Contract No. 1787 administered by the company?

A. As site clerk he was authorized by our treasurer in Boise, Idaho, on my request; in other words, I requested the treasurer to authorize him to sign checks on their behalf.

Q. And in what manner were the checks procured that were to be signed by Mr. King?

A. The checks to be signed by Mr. King were furnished by our [365] Anchorage headquarters office.

Q. Now, as administrative superintendent, did you have anything to do with these checks that might have been sent to Mr. King?

A. Yes, it was my responsibility to obtain and distribute the checks to the authorized individuals as they were needed.

Q. Was there any other way, other than through you, that Mr. King and other site persons could obtain checks to be used?

A. Not on official M-K checks, no.

Q. Now, as superintendent of administration for Contract 1787 do you have in your custody the books and records pertaining to the financial bookkeeping transactions of Contract 1787?

A. Yes, sir, I'm custodian.

Q. Now, as part of such bookkeeping records, does your office maintain a record of the number of checks which have been used by the Morrison-

(Testimony of Ronald W. Lovely.)

Knudsen Company and paid to the First National Bank of Anchorage, Alaska?

A. We maintained a complete inventory of all the checks.

Q. Now, I call your attention again to Plaintiff's Exhibits 1 through 19 and 21, which are the twenty checks involved in this case, and I call your attention that the serial number which appears on the right-hand side of the check are all in the eight thousand series and the nine thousand series, and ask you to consult your records, if you must, and answer me [366] whether or not your company checks in the eight thousand series and the nine thousand series have been paid by the First National Bank of Anchorage, Alaska?

A. The series in which these particular checks fall have all been accounted for except two.

Q. Would you tell us what those two are, sir?

A. One is check No. 8408 which was issued to John M. Scott in the amount of \$86.50. This check has never been cashed by the bank. Check No. 8321 issued to a man by the name of Allen W. Klinky in the amount of \$93.30 was lost and replaced by voucher check on November 15, 1957. That check was supposedly destroyed.

Q. Now, Mr. Lovely, will you look at what's been marked for identification only as Plaintiff's Exhibit No. 22 and tell me what it is, if you know?

A. The point of identification——

Q. Well, first tell me what it is, if you will, sir?

A. Is this the one?

(Testimony of Ronald W. Lovely.)

Q. Yes.

Mr. Plummer: May I approach the witness, your Honor?

The Court: Yes, you may.

A. This is a regular payroll check issued with the signature of Guy M. King at our site 22 at Galena on July 3, 1956.

Q. Now, I wonder, sir, if you'd take what's been marked for identification, known as Plaintiff's Exhibit No. 22 and check [367] it against the objects that you have in front of you and marked Plaintiff's Exhibits 1 through 19 and 21 and tell me the difference, if there is any difference, between the two exhibits?

Mr. Kay: I think that is invading the province of the jury, your Honor, to inspect and compare unless Mr. Lovely is shown to be an expert in some regard and there has certainly been no foundation for any expert testimony. As far as we stand right now anybody in the courtroom is just as well able to compare these checks as Mr. Lovely and, certainly, that is a question for the jury to determine as to whether or not there are points of comparison and points of difference.

The Court: Well, of course, that is true; on the other hand, if he knows there is any difference he may testify as to what he knows of his own knowledge.

Mr. Plummer: Certainly can testify to what he sees.

Mr. Kay: Anybody could testify if he was per-



(Testimony of Ronald W. Lovely.)

mitted to by the Court, but I shouldn't think that a person who is not an expert would be allowed to testify as to matters which are just common appearance.

The Court: Counsel, the testimony of this witness is that he is the man who procured all of the checks that went to Job 1787.

Mr. Kay: Right.

The Court: Now, he might have some personal knowledge. [368]

Mr. Kay: If he does that is different, but just a matter of comparing these checks from the witness stand is what I was objecting to because it seemed to be unnecessarily time consuming job and should be left for the jury.

The Court: Mr. Lovely, don't answer that question unless you know because you have not been qualified to be an expert in this field.

A. Only through association, sir.

The Court: Well, please proceed. That is up to counsel for the Government.

Q. (By Mr. Plummer): Would you first look at Plaintiff's Exhibit No. 22 and tell me what distinguishing marks it has that you know of as a valid M-K payroll check which was used on 1787?

A. First of all, the first most noticeable thing is the water mark in the paper which is distinguishable from both sides which bears the name Morrison-Knudsen Company and a circle which is the M-K decal just below it.

(Testimony of Ronald W. Lovely.)

The Court: Pardon me. What is a water mark, Mr. Lovely?

A. The water mark is an insignia that is printed into the paper for identification purposes.

Mr. Plummer: His Honor knows. He wanted to make sure that the jury all knew, Mr. Lovely.

Q. (By Mr. Plummer): Now, would you look at No. 22 and tell me if there are any [369] other distinguishing marks on it?

A. Yes. For one thing, the Exhibit 22 has a basket weave in the paper on both sides except that space where the identification mark is, whereas, the others have horizontal parallel lines.

Q. Now, will you look at Plaintiff's Exhibits 1 through 19 and 21 and tell me if the water mark is on that that you mentioned appears on those drafts?

A. The watermarking is definitely different. It has an arrowhead watermark.

Q. And to answer my question, does the M-K watermark appear on there?

A. In 15 years with Morrison-Knudsen I have never known them to use an arrowhead watermark.

Q. Now, will you see if the basket weave design you mentioned appears on Plaintiff's Exhibits 1 through 19 and 21?

A. No, this check seems to have horizontal parallel lines which are broken by what seems to be an arrowhead at intervals of about an inch and a half or an inch and a quarter apart.

Q. All right, Mr. Lovely, again I direct your

(Testimony of Ronald W. Lovely.)

attention to Government's Exhibits 1 through 19 and 21 and ask you to inspect them and ask you if they were authorized or prepared by your company to be issued under Contract 1787?

A. No, sir, they were not issued by my company for the reason that most of these checks could not have been issued by Guy M. King at our Galena site because the checks were never [370] issued to that site. I have here a record of the checks in the series 8,001 to 8,500 were issued to the Galena site and bear the signature of Guy M. King. Series 8,501 to 9,000 were issued to our site Number 2 at Big Mountain which is on the south shore of Lake Iliamna and would have been signed by C. A. Wilson, who is our authorized site clerk at that location. Checks No. 9,001 to 9,500 were issued to our site Number 9 at Aniak and our authorized signature there was David D. Field. Checks No. 9,501 to 10,000, inclusive, were issued to our Site 8 at Cape Lisburne. Right offhand I do not know who the authorized signature was there, but it was not Guy M. King.

Q. Now, I wonder, Mr. Lovely, if you would compare the serial numbers on the checks which have been marked for identification as Plaintiff's Exhibits 1 through 19 and Exhibit 21 and advise me if they are true M-K checks which have been paid and charged against the Morrison-Knudsen Company for these checks?

A. Plaintiff's Exhibit No. 22 has been paid by

(Testimony of Ronald W. Lovely.)

the bank. It is an official M-K check and bears the perforation of the bank.

Q. I was wondering about 1 through 19 and 21?

A. 1 through 19 and 21 have never been charged to our account by the bank and they do not bear the bank perforation.

Q. Would you look at the checks 1 through 19 and 21 and tell me what date appears as the date the checks were made? [371]

A. I see the date August 21, August 29, August 15, August 22.

Q. Well, do you see any earlier than August 22, 1956? Are there any of the exhibits that bear a date earlier than August 22, 1956?

A. I believe there was one for August 21.

Q. Any earlier than August 21?

A. No, sir.

Q. Now—

A. Beg your pardon. There is one for August 15 here.

Q. I am sorry. A. None earlier.

Q. Do you know where Mr. Guy M. King was employed by your company—was he employed by your company at that time, sir?

A. Yes. On July 25 Mr. King was transferred into our Anchorage office.

Q. And I take it then he was no longer at the job site in Galena during the period to which these checks appear to have been dated?

A. No, sir.

(Testimony of Ronald W. Lovely.)

Q. All right. Is Mr. King still with your company?      A. No, sir.

Q. Will you tell us when he terminated his employment, if you know?

A. He was transferred to another contract the latter part of August. [372]

Q. Do you know where he is at present, sir?

A. No, sir, I do not.

Q. Now, Mr. Lovely, as site clerk was G. M. King authorized to use a stamp signature?

A. No, sir, we never used stamp or facsimile signatures at all on Contract 1787.

Q. Would you look at Plaintiff's Exhibits 1 through 19 and 21 and see if that appears to be a signature by G. M. King or a stamp signature?

Mr. Hepp: I object to that. I don't think there is any showing that this witness is qualified as an expert to determine whether a signature is stamped or, for that matter, Guy M. King's signature. He hasn't even stated that he has ever seen King's signature.

The Court: Objection sustained.

Q. (By Mr. Plummer): Mr. Lovely, are you familiar with the signature of Guy M. King?

A. Yes, sir.

Q. Have you seen it over the course of business, his business as site manager on 1787, up at Galena numerous times?

A. Yes. Preliminary to his being authorized he signed the signature authorization card which I for-



(Testimony of Ronald W. Lovely.)

warded to the treasurer in Boise, Idaho, to have him authorized to sign.

Q. And you have seen checks signed by him subsequent to his employment? [373]

A. Yes, sir.

Q. Now, I'll ask you if you will look at the Exhibits 1 through 19 and 21 and ask you if that appears to be the signature of Guy M. King?

A. It appears to be. It's rather shaky. It isn't as bold and firm a stroke as his signature, however, it does appear to be, at least, a copy of his signature.

Q. Now, I will ask you, sir, as supervisor of administration, if you will check the serial numbers on Plaintiff's Exhibits 1 through 19 and 21 against your records and see if in fact your company, Morrison-Knudsen Company, Inc., issued other checks bearing those same serial numbers which were charged against your company?

A. Here is a check No. 8893 which appears to be Exhibit 9. This check supposedly was made to—the check was made payable to Wendell R. Ware. The true check number 8893 which was paid by the bank on July 2, 1956, was made payable to Charles E. Gibson and was signed by C. A. Wilson at our Site 2. Check 8895, which is Exhibit 10, made payable to Wendell R. Ware; the official check 8895, which was paid by the bank on July 6, 1956, was made made payable to Loren F. Napp and signed by C. A. Wilson at our Site No. 2. Check Number 8903, which is Exhibit 1, made payable to James C. Woods; the official check was Number 8903 which was paid by

(Testimony of Ronald W. Lovely.)

the bank on July 16, 1956, was made payable to James A. Clark and [374] was signed by C. A. Wilson. Exhibit No. 19 is Check No. 8924 made payable to Theodore Williams; official Check No. 8924 which was paid by the bank on August 10, 1956, was payable to Clement C. Cane and signed by C. A. Wilson. Check No. 8927, which is Exhibit No. 14, payable to Theodore Williams; true Check No. 8927 which was paid by the bank on July 9, 1956, was made payable to Loren F. Napp and signed by C. A. Wilson.

Q. Would you just continue to do that until you run through the—— A. Okay.

Q. (Continuing): ——list of exhibits?

A. Check No. 8941, which is Exhibit 21, made payable to Wendell R. Ware; true Check 8941 which was paid by the bank on July 3, 1956, was payable to Paul W. Rebb and was signed by C. A. Wilson. Check No. 8965, which is Exhibit No. 11, made payable to Wendell R. Ware; official Check 8965 which was paid by the bank on July 16, 1956, was payable to Micheal A. Rikeroff and signed by C. A. Wilson. I notice that some of these numbers are hard to read on this.

Q. On those if you will say the first two digits or whatever you can read and say the next number indistinguishable and then the last number.

A. Exhibit No. 13 appears to be Check No. 9005 payable to Thomas A. Brown; official Check 9005 was paid by the bank on August 5, 1956, was payable to Lyle Thomas and was signed by David D.

(Testimony of Ronald W. Lovely.)

Fields. Exhibit No. 16; Check No. 9008, payable [375] to Thomas A. Brown; official Check 9008 which was paid by the bank on July 5, 1956, was made payable to David D. Fields, signed by David D. Fields and counter-signed by Jack Neubauer, who was the site superintendent and authorized to counter-sign. Exhibit No. 2, Check No. 9012, is made payable to James C. Woods; official Check 9012 which was paid by the bank on July 7—pardon me, it was paid on March 7, 1956, was made payable to Bobby McKinley and was signed by David D. Fields. Check No. 9015 is Exhibit 17 and was made payable to Thomas A. Brown; official Check 9015 which was paid by the bank on March 7, 1956, was made payable to Evan Wacilli and was signed by David D. Fields. Check No. 9051, which is Exhibit 6, was made payable to James C. Woods; official Check No. 9051, which was paid by the bank on March 22, 1956, was made payable to John R. O'Toole and was signed by David D. Fields. Check No. 90—blank—6, which is Exhibit 7, was made payable to James C. Woods. I am not sure that this is the same check, however, it is 9056, was paid by the bank on March 27, 1956, was made payable to Russell J. Stoiman and signed by David D. Fields. Check 9057, which is Exhibit 18, payable to Thomas A. Brown; official Check 9057, which was paid by the bank March 27, 1956, was made payable to Sylvester Taylor and signed by David D. Fields. Check 9065, which is Exhibit 5, was made payable to James C. Woods; official Check 9065, which was

(Testimony of Ronald W. Lovely.)

paid by the [376] bank on March 27, 1956, was made payable to Dennis A. Short and was signed by David D. Fields. Check 9073, which is Exhibit 15, was made payable to Thomas A. Brown; official Check 9073, which was paid by the bank on April 3, 1956, was made payable to Robert Harrimore and signed by David D. Fields. Check No. 9078, which is Exhibit—

The Court: May I help you, if I can.

A. (Continuing): —which is Exhibit 8, was made payable to Wendell R. Ware; official Check 9078 was made payable to the bank on March 27, 1956, was made payable to Michael Oskas and signed by David D. Fields. Check No. 9089, which is Exhibit 12, was made payable to Thomas A. Brown; official Check 9089, which was paid by the bank on April 30, 1956, was made payable to David D. Fields and signed by David D. Fields. That appears to be all that I can match up. There are two left here but the check I have left doesn't match either one of them.

Q. Could you have mistaken or could you—did you check Plaintiff's Exhibit No. 21, sir, for identification only—did you check Plaintiff's Exhibit No. 21 for identification only and try and match it up?

A. Plaintiff's Exhibit 21?

Q. Yes, sir.

Mr. Nesbett: He did.

The Court: That is the one that is not enclosed, I [377] believe, Mr. Lovely.



(Testimony of Ronald W. Lovely.)

Mr. Plummer: That would be 22. That's the valid check.

The Court: I see.

Mr. Plummer: Very good. At this time, your Honor, I offer into evidence Plaintiff's Exhibit No. 9 for identification, which has been marked for identification only, Plaintiff's Exhibit 21 and Plaintiff's Exhibit 22.

The Court: Is there objection? (Pause.) Without objection it may be admitted—

Mr. Kay: Just a moment until we check, your Honor.

The Court: All right. Very well. Well, No. 9, of course, has been submitted to you sometime ago, also 21 and 22.

Mr. Kay: I have no objection, your Honor.

The Court: Very well, it may be admitted then without objection.

Mr. Nesbett: I am sorry. Just a moment.

The Court: Very well, the Court will reserve its decision pending further investigation by counsel for the Defendant Smith.

Mr. Nesbett: I would like to ask the witness a question or so, your Honor. May I have Exhibits 9 and 21 and 22?

The Court: Very well, you may hand them to counsel, please, 9, 21 and 22.

(Thereupon, the exhibits were handed to Mr. Nesbett.)

Mr. Plummer: May I approach the witness, your Honor? [378]



(Testimony of Ronald W. Lovely.)

The Court: You may. Any objection, Mr. Nesbett?

Mr. Nesbett: These, your Honor—no.

The Court: It may be admitted then and marked Exhibits 9, 21 and 22, specifically, then.

Q. (By Mr. Plummer): Now, Mr. Lovely, will you tell me whether Plaintiff's Exhibits 1 through 19 and 21, which you have inspected here, were ever in the possession of your office, of your company?

A. No, sir.

Mr. Plummer: I have no further questions.

The Court: You may cross-examine.

#### RONALD W. LOVELY

testifies as follows on

#### Cross-Examination

By Mr. Nesbett:

Q. Mr. Lovely, was Mr. King discharged from the employment of M-K Company?

A. No, sir, he was transferred to our other contract, 1859.

Q. That occurred in August or September of 1956, did it?

A. Latter part of August, I believe it was.

Q. Is he still with the company?

A. No, sir, he is not.

Q. When did he leave the employment of the company?

A. I'm not sure, sir. I don't know when he left the other [379] contract because that isn't part of my responsibility.

(Testimony of Ronald W. Lovely.)

Q. But you did learn that he was no longer with the company, is that right? A. Yes.

Mr. Nesbett: I have no further questions.

The Court: Any other cross?

Mr. Gore: Yes.

The Court: Mr. Gore.

### RONALD W. LOVELY

testifies as follows on

#### Cross-Examination

By Mr. Gore:

Q. Did you state the date upon which Mr. King was transferred from the job site into Anchorage?

A. Yes, sir, I did.

Q. And what was that date?

A. July 25, 1956.

Q. And at the time he was transferred from the job site into Anchorage did his authority to sign pay checks on that job site cease?

A. Yes, sir, because he was replaced by another site clerk.

Q. Mr. King was under bond at the time, was he not?

A. Yes, sir, they are bonded.

Q. And the bonding regulations require that immediately upon [380] the appointment of a relief man or a substitute man that they be no longer authorized to sign checks?

A. No, sir, that isn't true because the man was transferred to our Anchorage office.

(Testimony of Ronald W. Lovely.)

Q. Was Mr. King authorized to sign checks on behalf of M-K Company for this job site as of the first day of August, 1956? A. Yes, sir, he was.

Q. Was he authorized to sign checks for this job site as of the 15th day of August, 1956?

A. Yes, sir.

Q. When did his authority to sign those checks cease?

A. His signature authorization was cancelled on September 7, 1956. The reason it wasn't cancelled sooner is because he was being considered for re-assignment at one of the other sites.

Q. Then had those checks been, in fact, signed by Mr. Guy M. King they would have been good, would they not?

A. That's right, sir. They would have been.

Q. And are you able to state of your own personal knowledge that Mr. Guy M. King did not sign those checks? A. Yes, sir, I am.

Q. And upon what do you base that statement?

A. The site where Mr. King was located is at Galena and it's considerable distance from Anchorage and he was employed at our Anchorage office during this period. [381]

Q. And did you happen to observe Mr. King all during that period of time?

A. Most of the time, sir.

Q. And it would have been physically impossible for him to have signed those checks?

A. Yes, sir.

(Testimony of Ronald W. Lovely.)

The Court: Any other cross? (Pause.) Is there any redirect?

Mr. Plummer: No, your Honor.

The Court: Very well. Mr. Lovely, you may step down. May this witness be excused?

Mr. Plummer: As far as the Government is concerned he may be, your Honor.

The Court: As to the defense?

Mr. Kay: Yes, your Honor.

The Court: Very well, you may be excused, Mr. Lovely. Thanks for coming.

(Thereupon, the witness was excused and left the stand.)

The Court: It is now seven minutes to 12:00. Could we get started on another witness?

Mr. Plummer: We have one very short witness if she's available. Will you call Lois Bradley, please. She should be in the hall.

The Court: For the Court's information, Mr. Plummer, could you advise us how many more witnesses you intend to call? [382]

Mr. Plummer: Let me think, your Honor. (Pause.) Probably seven or eight. Some of them will be real short.

The Court: Very well.

Mr. Plummer: Some will be quite lengthy.

The Court: Then can the defense expect to go to the proof of their case this afternoon?

Mr. Plummer: Oh, I'd say—it will depend on the cross-examination, but I would be extremely

doubtful if we will complete the case prior to quitting time tonight.

The Court: Thank you. Can counsel for the defense assist the Court in stating how many witnesses you intend to call?

Mr. Kay: Well, at the present state of the case, your Honor, until we hear the remaining seven witnesses, I couldn't estimate. I would have no way of anticipating at all.

The Court: Well, isn't one of the counsel able to tell whether or not you are going to call any witnesses?

Mr. Kay: As it stands right now, I certainly won't.

The Court: Mrs. Bradley, will you please come forward and take the oath.

LOIS BRADLEY,

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Plummer: [383]

Q. Will you please state your name?

A. Lois Bradley.

Q. And what is your present occupation?

A. I am Clerk of the Criminal Court in the United States Commissioner's office.

Q. Did you at my request bring a certain file from your office down to the courtroom?

A. I did.



(Testimony of Lois Bradley.)

Q. And would you tell me what it is, sir—or, ma'am?

A. Well, it's a copy of the transcript that was sent to the District Court of the case against—United States vs. Charles Edward Smith.

Q. And is that your official record?

A. It is.

Q. Down in your court? A. It is.

Q. Would you look the transcript over and tell me what, if anything, appears there on March 21st, under the date of March 21, 1957?

Mr. Nesbett: Your Honor, Mr. Plummer hasn't observed the usual rule of showing us the document that he intends to question the witness on, and I object to the question that's now, as yet, unanswered, on the ground that it has not been shown that she is looking at an official record.

The Court: Counsel, could you present the record to—— [384]

Mr. Plummer: Yes, I didn't want to keep anybody here over the noon hour and as a matter of fact, I didn't, your Honor, intend to offer this, if I could get away from it because it is their official record down there. I was merely going to have her tell what it says. I, through the Court, will apologize to counsel for not observing the proprieties.

The Court: The Court accepts your apology. Thank you. You may proceed.

Q. (By Mr. Plummer): I ask you if you will, Mrs. Bradley, look at your transcript and advise the

(Testimony of Lois Bradley.)

Court and the Jury what appears under date of March 21, 1957.

Mr. Nesbett: I will object, your Honor, first, on the ground that as I said before, the document has not been identified as an official record, firstly. Secondly, on the ground that the document is complete—has no relevancy whatsoever to the proceedings here and I ask if your Honor would take a look at it yourself. It's simply a self-serving attempt to cast innuendo and nothing else; has no relevancy whatsoever. There's been—the indictment is before the jury.

The Court: The objection is overruled on the first ground because the evidence as I recall is this witness testified that it was. As to the second ground—just a moment, please. Would counsel approach the bench, please?

(Thereupon, the United States Attorney, together [385] with defense counsel and the Court Reporter approached the bench and the following proceedings were had out of the hearing of the jury:)

The Court: Mr. Plummer, what is your purpose of—

Mr. Plummer: To show, your Honor, that he was arraigned—let the jury know what you, of course, heard in yesterday afternoon's discussion, having been arraigned here on March 21. Subsequent to that he made oral admissions to various people around town and it is my intention to call them and have them testify as to the oral admis-

(Testimony of Lois Bradley.)

sions he made, which is perfectly proper. I want to first, of course, want to bring out that he was arraigned and his rights were advised by a Commissioner here and then, of course, any oral statement he might have made to anybody subsequent to that time is properly admissible.

The Court: What is your position, Mr. Nesbett?

Mr. Nesbett: Well, the witnesses are before us and he's not offered that testimony. I say as to this right now, it's absolutely irrelevant and has no connection whatsoever with this case, your Honor. It's designed only to cast innuendo because he has been indicted. They're trying him on the indictment. This has no relevancy.

The Court: It's your position then, that he can call these witnesses without proving this——

Mr. Nesbett: It's my position he can't call a witness at all for that purpose. [386]

Mr. Plummer: What basis, Mr. Nesbett, through the Court, I will ask, on what basis?

Mr. Nesbett: I am not arguing that right now, Mr. Plummer, but that is going to be my stand, of course, and this has nothing whatsoever to do with the issues here that he has been indicted. It would be just like you could multiply that, your Honor, and show that he had been charged two or three or four times and it might accumulate effect as far as the jury is concerned and have a weight far beyond its real significance.

The Court: I would suggest to counsel for the Government that you offer it for identification as

(Testimony of Lois Bradley.)

No. 23. The Court at this time will have to sustain the objection, and then it will be available in the event it becomes necessary at a later time.

Mr. Plummer: I think, before we conclude our hearing, that this jury certainly have a right, when they're going to be asked to evaluate the weight and credibility, especially in view of the standard instruction that your Honor gives as to oral admissions, to know that at the time the witness testifies, that the Defendant Smith had previously been arraigned before the United States Commissioner and advised of his rights. I think they cannot properly evaluate the weight and credibility of the testimony without it.

The Court: Well, the objection is sustained for the time being and it may be admitted unless you have objection to [387] it—for identification purposes only as Government's Exhibit No. 23.

Mr. Plummer: Can this witness testify from it?

The Court: Well, at this time, Mr. Plummer, I do not believe that it's admissible. Now, I point out to Mr. Nesbett that if by chance you do object to the witnesses that Mr. Plummer intends to call, and this being a basis therefor, then, of course, at that time, the Court can reconsider the offer.

Mr. Nesbett: Your Honor, could we do this: could we convene court without the jury at 2:00 o'clock and argue Mr. Plummer's point. If he is right, then, of course, let the tail go with the hide, but if he is not right, settle the thing once and for all.

(Testimony of Lois Bradley.)

The Court: Well, I am not going to exclude spectators from the courtroom any more during this trial unless there is something that I can't anticipate and furthermore, I am not going to exclude the jurors unless argument be had, now, concerning argument at the bench on that basis.

Mr. Plummer: Now, this will be 23 for identification?

The Court: Yes, only.

(Thereupon, counsel for the plaintiff and defendants resumed their seats and the following proceedings were had in the presence of the jury:)

Mr. Plummer: Your Honor, may Miss Bradley make a copy and substitute it for this one? [388]

The Court: Any objection?

Mr. Nesbett: No objection.

The Court: Very well. Mrs. Bradley, will you do that during your lunch hour, then? Thank you. Unless—you may be excused then unless counsel had cross, which I doubt, at this time.

Ladies and gentlemen of the jury, it's now after 12:00, therefore, the trial of this case will be continued until 2:00 p.m. As you know, I must instruct you not to discuss this case among yourselves, nor are you permitted to let others discuss it with you, and this court will stand in recess until 1:30.

(Whereupon, at 12:05 o'clock p.m., the court continues the cause to 2:00 o'clock p.m. of the same day.)



(At 2:00 o'clock p.m., all counsel being present, the trial of said cause was resumed.)

The Court: Will counsel stipulate that all the jurors are back and present in the courtroom?

Mr. Plummer: Yes, your Honor.

Mr. Kay: Yes, your Honor.

The Court: Very well, thank you. You may call your next witness, Mr. Plummer.

Mr. Plummer: I'd like to call Mr. Edward Dankworth.

Mr. Nesbett: Your Honor, before this witness testifies, [389] may I approach the bench with Mr. Plummer?

The Court: You may.

(Thereupon, counsel for the plaintiff and the defendants, together with the Court Reporter, approached the bench and the following proceedings were had out of the hearing of the jury:)

The Court: Mr. Nesbett.

Mr. Nesbett: Your Honor, I only know this witness by reason of the fact that he introduced himself to me in the hall just a moment ago, but apparently, he runs a lie detector for the Territory of Alaska. Now, I don't know whether he is one of the witnesses Mr. Plummer said he'd call in connection with admissions made by the defendant after his arraignment here on the 21st or not, but the mere fact that if he does identify himself as an operator of that, that piece of equipment, and his later testimony should be included by reason of the arguments

Mr. Plummer and I will have here at the bench on the admissibility of admissions, I think it would be damaging, and, therefore, I want to settle this matter once and for all, right now, before your Honor, as to whether or not he can call this witness to testify as to admissions made after this arraignment here.

The Court: Well, of course, I am perfectly willing to go ahead at this time and listen to your argument, if there is any more objection on the part of the Government. [390]

Mr. Plummer: I will first advise the Court that because of Mr. Nesbett's apprehension about the mention of the word "lie detector," it was not contemplated that that would be brought out, but it could very well come out through inadvertence, you know. On the other, I'd be glad to argue it now, or when the time is appropriate.

The Court: Well, let's proceed right now.

Mr. Nesbett: Thank you, your Honor.

The Court: Very well, you may proceed, Mr. Nesbett.

Mr. Kay: Would you want to argue here at the bench?

The Court: Yes, I do, so as not to inconvenience the jurors, unless there is some reason to the contrary.

Mr. Kay: No, except it's more convenient to be back at your desk; since I am not arguing it, though——

The Court: You may proceed, Mr. Nesbett.

(Following arguments of counsel, the following proceedings were had:)

The Court: Well, of course, the Court can't prejudge a matter. I am glad to have expression of opinions of counsel prior to his testimony, but until such time as it's been shown that this statement was obtained contrary to the law, I feel that the objection should be overruled pending that determination.

Mr. Plummer: I wonder, while counsel is still at the bench, if you would ask the witness to come over here so there will not be any possible mistake—admonish him not to use the [391] word “polygraph,” or “lie detector,” anything like that in his answers.

The Court: Is there any objection on that part?

Mr. Nesbett: No, I have no objection.

The Court: Will you come around, please.

(Thereupon, the witness approached the bench.)

The Court: Mr. Dankworth, Mr. Plummer advises me that you are with the Territorial Police and that you have specialized somewhat in the lie detecting?

Mr. Dankworth: That is correct.

The Court: Now, based upon stipulation of counsel, if there is no objection to the Court advising you, the Court will instruct you during your testimony, you are not to refer to a lie detector or polygraph or any other reference that may connect

it up with that type of evidentiary obtainment. Do you understand that?

Mr. Dankworth: Yes, sir, I understand that.

The Court: Very well, thank you.

(Thereupon, all counsel, together with the Court Reporter and the witness resumed their respective seats, and the following proceedings were had in the presence of the jury:)

M. E. DANKWORTH

called as a witness for and on behalf of the plaintiff, and being [392] first duly sworn, testifies as follows on

Direct Examination

By Mr. Plummer:

Q. Would you please state your name, sir?

A. M. E. Dankworth.

Q. Your occupation?

The Court: How do you spell that?

A. D-a-n-k-w-o-r-t-h.

Q. (By Mr. Plummer): Your occupation?

A. I am an officer with the Department of Territorial Police.

Q. Where are you stationed, sir?

A. Juneau, Alaska.

Q. Were you with the Territorial Police on or about March 7, 1957, sir? Were you employed by them on that date?

A. Would you repeat the date, please?

Q. Were you employed by the Territorial Police on or about March 27, 1957?

(Testimony of M. E. Dankworth.)

A. Yes, sir, I was.

Q. And did you have occasion to be in Anchorage on that date? A. I did.

Q. Do you know the defendant in this case, Charles E. Smith? A. I do.

Q. Did you have occasion to see Mr. Smith on March 27, 1957? A. I did. [393]

Q. Would you tell us where you saw him?

A. I saw him at the Department of Territorial Police office, here in Anchorage.

Q. Did you have a conversation with him at the time you saw him? A. Yes, I did.

Q. Would you be good enough, sir, to relate what that conversation was?

Mr. Nesbett: I will object, your Honor, to that. There has been no foundation laid or——

The Court: Objection sustained.

Q. (By Mr. Plummer): Will you tell us—the date, I presume, is March 27, 1957?

A. That's correct.

Q. The place?

A. It was the Territorial Police Headquarters, here in Anchorage.

Q. And the time?

A. Approximately between one and one-thirty p.m.

Q. And the persons present?

A. Myself, Mr. Smith, and Mr. Harkabus.

Q. Now, did you have a conversation with him on that occasion? A. Yes, I did.



(Testimony of M. E. Dankworth.)

Q. And would you tell us what the conversation was about, sir?

Mr. Nesbett: Now, your Honor, I will object again, and ask that a hearing be held in connection with the circumstances of the evidence which we know is to be elicited from the witness by [394] reason of our conference at the bench. I make that request for the purpose of the record.

The Court: Objection overruled. You may proceed.

Q. (By Mr. Plummer): Would you tell us what this conversation was about, sir?

A. Yes, sir.

The Court: Now, just a moment, please. Would counsel come to the bench and would the witness come to the bench for just a moment, please?

Mr. Plummer: Yes, sir.

(Thereupon, all counsel, together with the Court Reporter, and the witness approached the bench and the following proceedings were had out of the hearing of the jury:)

The Court: Mr. Dankworth, because of the law, it was necessary to rule that the statement made by Mr. Smith could not be admitted into evidence. Now, I did not apprise you of this, but any reference to that statement, likewise, is not admissible, in addition to the fact that you cannot refer to your employment and the type of employment that you are with, the Territorial Police. I must instruct you not to refer—if the conversation alluded to the

(Testimony of M. E. Dankworth.)

statement because the statement has been determined to be inadmissible. You understand that now?

Mr. Dankworth: Yes, your Honor, I understand that.

The Court: All right. Thank you. [395]

(Thereupon, all counsel, together with the Court Reporter and the witness, resumed their respective seats and the following proceedings were had in the hearing of the jury:)

The Court: Do you remember the question?

A. I would like to have it repeated.

Q. (By Mr. Plummer): Would you be good enough to tell the Court and jury what the conversation was about, sir?

A. Yes. I was to interview, with Mr. Harkabus, Mr. Smith about a matter that has nothing to do at the present with this case on trial.

Q. And did you in fact have such an interview?

A. I did.

Q. And did you conclude that portion of the interview? A. I did.

Q. And what did the defendant say, if anything, at that time?

A. As I am testifying only to memory, there will be portions of it that I don't recall, but the portions that I do recall—the defendant, Mr. Smith—if the Court will give me just one moment here. (Pause.)

The Court: Take your time.

A. As I recall the conversation, the defendant

(Testimony of M. E. Dankworth.)

was asked if he knew anyone who was involved in this particular matter which has nothing to do with this case. The defendant [396] stated that he did not want to be a stool pigeon, or known as a stool pigeon. He says, "I, in the past, have got mixed up with the wrong crowd. I got mixed up in the M-K check deal. I cashed the checks. I want to plead guilty and I want to serve my time, but I don't want to be a stool pigeon."

Q. Do you recall anything else he may or may not have said, or you think he might have said on that occasion, sir?

A. Mr. Smith was asked what time or when did he come to Anchorage, in reference to the M-K check caper.

Q. And do you recall what he replied, sir?

A. Yes. I don't recall everything he said, but I do recall this portion: Mr. Smith stated that he had arrived in his pick-up with a gentleman by the name of Volk from Fairbanks. Upon arrival in Anchorage they had stopped at the Westward Inn at which time Mr. Volk left the pick-up. He had driven on to a bar somewhere within a block or two blocks of the Westward Inn. I don't recall, it seems that he mentioned the name of the bar, but it seemed like it was "Silver" something, or "Golden" something, but I don't recall the name of the bar. He said that he was to wait there for Mr. Volk to return. Shortly—or, I don't recall the time element—it seems he said, after a while, this Mr. Volk returned to the bar that he was waiting in with a

(Testimony of M. E. Dankworth.)

bag and two packages of M-K checks and an identification card [397] which he had seen in the International Hotel in Fairbanks and the card, I don't recall the full name on the card, but I recall the name "Ware" was on it and his picture was on it and that the picture had been made by himself and I believe, as I recall, it could have been someone else, but it seemed like he said he and Mr. Volk had taken pictures of one another at the International Hotel. Mr. Smith stated at that time that he had asked Mr. Volk where the checks came from and that Mr. Volk advised him he was getting too nosey and it was none of his business and that Mr. Smith stated that he considered that good advice and never asked any more about it. He stated that he then proceeded with Mr. Volk to cash these M-K checks and I don't recall how many places—it seems to me fifteen—ten to fifteen, I am not for sure of the number of places he said he cashed them. After doing this, he had gone to, I believe a movie—yes, he had gone to a movie. I don't recall whether his movie, was interrupted or after the movie, he was again contacted by this Mr. Volk, at which time he was told to—that something had happened in Fairbanks, and that it was necessary for them to return to Fairbanks immediately. He had stated that he had left his pick-up before going to the movie at a service station somewhere in the vicinity of the Westward Inn. After picking up their pick-up, they had gone out the Glenn Highway toward the Army camp and there was [398] something he said in



(Testimony of M. E. Dankworth.)

reference to—he recalls there was a lot of lights off to the left-hand side of the road which appeared to be a hotel or hospital or something and it was along this point in the highway that he and Mr. Volk had turned off onto a little side road, driven a short distance and stopped. There, they unloaded the merchandise they had bought with the M-K checks which consisted of some tires—there was probably some other items, but I recall tires, battery and high-powered glasses and a hat and they had kept something, and it seems to me it was whiskey; I am not for sure, but it seems they kept some whiskey or apples or something, and that is about all that I recall, other than he says that at that time the money was in either a—wrapped in brown paper or it was in a paper bag, now, which one of the two, I don't recall, in the custody of Mr. Volk and they returned to Fairbanks. He was then asked if he would mind, or, if he would go out on the highway and show us where he dumped these things which he agreed to do. At the time, in the custody of Mr. Pass, and in the presence of Harkabus, Mr.—Sgt. Laird, Department of Territorial Police, and myself, and Mr. Smith drove out on the Glenn Highway. Due to the snow, Mr. Smith wasn't able to find the exact road. He said he wasn't for sure just which road it was and there was a number that was leading off—at any rate, we were unable to find any of the things that he had [399] thrown out of the truck at which time they returned and they let me out of the automobile at the Territorial



(Testimony of M. E. Dankworth.)

Police Headquarters and that is the last time I seen Mr. Smith until this day.

Mr. Plummer: I have no further questions.

The Court: You may cross-examine then.

M. E. DANKWORTH

testifies as follows on

Cross-Examination

By Mr. Nesbett:

Q. That all occurred in the month of March of 1957, Mr. Dankworth? A. Yes.

Q. When you hesitated before you commenced to testify, were you trying to refresh your recollection?

A. No, sir, I was taking in some cautions of the Court, that the Court had given me as to the wording.

Q. You weren't trying to get straight in your mind the recitation you just have given, is that right?

A. No, sir, I was taking two things into consideration: the instructions of the Court and the continuity of what was said when it was said, to begin it properly.

Q. Did you, during the time you hesitated, review the continuity of the recitation that you have just given to the Court? A. No. [400]

Q. Now, Mr. Harkabus had Smith in custody at that time, didn't he?

A. I don't know which one of the officers had him in custody. He was in custody, but as to

(Testimony of M. E. Dankworth.)

whether it was Mr. Pass or just who brought him out there, I don't know.

Q. He was brought to you from the jail here in the custody of those officers at the time you heard all this, wasn't he?

A. He was brought to the Territorial Police and reasonably, I suppose, we could assume from the federal jail.

Q. And the purpose of Harkabus' purpose there was to investigate an entirely different matter than the issues in this case, is that right?

A. Yes—if the word investigate is correct. We wanted to discuss something with him with reference to another case.

Q. And did this—all this that you have recited happen just casually after you completed or discussed the other matters with the original purpose of the visit?

A. That's true. The original purpose lasted a very short time as Mr. Smith made it quite clear, right quick, that he didn't want to be a stool pigeon and he started into this other.

Q. This other was just something that happened casually, after the main purpose had been taken care of, is that right?

A. Well, that is correct, to the extent that he had started talking after we had asked these other questions.

Q. Now, that was approximately a year ago, wasn't it? [401]

A. Yes, March 27th.

Q. Lacking probably one month?

(Testimony of M. E. Dankworth.)

A. That's correct.

Q. Have you refreshed your recollection on the conversation in any fashion since that time?

A. Very little, other than discussing it with Mr. Plummer. That is all.

The Court: Any other cross-examination? (No answer.) Very well. Any redirect, counsel?

Mr. Plummer: No, your Honor.

The Court: You may step down, Mr. Dankworth.

(Thereupon, the witness was excused and left the stand.)

The Court: Call your next witness.

Mr. Plummer: May the Bailiff call John Walker.

### JOHN WALKER

called as a witness for and on behalf of the plaintiff, and being first duly sworn, testifies as follows on

### Direct Examination

Mr. Plummer: Your Honor, while the Court is not otherwise engaged, I'll tell you that the witnesses that I propose to call—I said this morning seven or eight. Over the noon hour it's been cut down to probably three or four, so we will probably be either late tonight or first thing in the morning we will be through with our portion of the case. [402]

The Court: Very well. You may proceed, counsel.

By Mr. Plummer:

Q. Will you state your name, sir?

A. John Walker.

(Testimony of John Walker.)

Q. And where do you reside, Mr. Walker?

A. Seattle, Washington.

Q. Now, Mr. Walker, are you the John Walker mentioned in this criminal indictment that you are presently on, that is, presently on trial?

A. Yes, I am.

Q. And have you heretofore appeared before this Court and entered a plea of guilty to Counts 6, 7, 8, 9, 10 and 11 of this indictment? A. Yes.

Q. Now, do you know the defendant in this case, James Burton Ing? A. Yes, I do.

Q. And do you know the defendant in this case, Raymond Wright? A. I do.

Q. Mr. Walker, did you live in Alaska during the summer of 1956? A. Yes.

Q. And were you in Fairbanks during that period? A. I was.

Q. Specifically, were you in Fairbanks during the month of August of 1956?

A. I was. [403]

Q. Now, did you have a conversation with Mr. Raymond Wright on or about the 11th day of August in Fairbanks, Alaska? A. I did.

Q. And where did this conversation occur?

A. At the Beachcombers.

Q. Beachcomber? A. Yes.

Q. And would you help the jury out, is that where Mr. Wright lives?

A. That is Mr. Wright's place of residence.

Q. And do you recall the time of day it was?

A. It was in the evening.

(Testimony of John Walker.)

Q. And would you tell us who all was present, sir? A. Well, just Mr. Wright and myself.

Q. All right. Would you tell us what the conversation was, the gist of the conversation?

A. Well, he said that would I be interested in trying to make some big money and I told him I would.

Q. Now, did you have a subsequent conversation with him about this same topic?

A. Later?

Q. Yes, sir. A. Yes.

Q. And would you be good enough to tell us where this conversation occurred? [404]

A. This conversation took place on the 29th or 30th of August in the evening.

Q. And where did it occur, sir?

A. The first part of it at this establishment that Mr. Wright was building and the second part took place at the Beachcombers.

Q. And would you tell us what happened on that occasion—or, first, will you tell us who was present during the conversation, sir?

A. Oh, the conversation—the first part, well, he and I were just talking alone.

Q. Was it to the fact that you were working on this building you were constructing?

A. Yes.

Q. And would you tell us what happened at that place, what you saw?

A. Well, James Ing came by in the station wagon and he said something to Wright and they



(Testimony of John Walker.)

got in the station wagon and drove out towards the gravel pit.

Q. And how long were they gone, if you recall?

A. Oh, about 20, 30 minutes.

Q. And did they later return?

A. Yes, they did.

Q. And after returning did you have a conversation with Mr. Wright?

A. Well, he said that everything was okay. [405]

Q. What happened next, if anything?

A. Oh, it was almost quitting time. I'd been doing some work there on the building, so we left—I was living in a cabin on his place and we left and went to his house and had a few drinks.

Q. And was the defendant, James Ing, present during that time?

A. That same afternoon?

Q. When you went to the house to have some drinks?

A. Yes, he was.

Q. Did you have any conversation about the easy money when Mr. Ing was there?

A. He didn't say anything to me about the easy money, Mr. Ing didn't, no.

Q. When was the next time you discussed the incident with Raymond Wright or James Ing or both?

A. I never did discuss anything with Mr. Ing. The only thing, there was some conversation, but I don't recall just what it was—he took—when he took the picture that night of myself.

Q. And when was that?

(Testimony of John Walker.)

A. That was on the evening of the 29th or 30th of August.

Q. And would you tell us about it, sir? First, who was present and what was done?

A. Well, there was no one present but Raymond Wright, James Ing, and myself. [406]

Q. And where were you located?

A. That is in this particular room where the picture was taken.

Q. Is that in the Beachcombers?

A. Yes, it was.

Q. And would you tell me what happened?

A. Well, he opened the small——

The Court: Pardon me. When you say “he” would you refer to the name specifically?

A. James Ing opened a small overnight carrying case and within was a polaroid land camera and flash attachment.

Q. What, if anything, did he do with this land camera?      A. Took a picture of myself.

Q. And what happened to the picture after he took it, if you know?

A. Yes. The picture was too large for this place marked for identification and I took a razor blade and trimmed it down to the size so that it would fit.

Q. And what happened to the picture then?

A. It was pasted on to this identification card.

Q. And what happened to the identification card, if you know?

A. Well, I don't know what happened to it be-

(Testimony of John Walker.)

cause I didn't see it any more until arriving here in Anchorage.

Q. Now, was a Dewey Taylor there at that time?

A. No, he was not.

Q. Was there any conversation between the defendants, Ing and [407] Wright, because of Taylor's failure to be there?

A. Yes, there was something said as to why he wasn't there and he should have been there because he knew that he was supposed to have been there and, I don't know, it was something about Wright didn't think that Taylor was strong enough to go on the caper, as it was, so Ing said that he was okay. He said, "He will be okay."

Q. Now, did you have a subsequent conversation with Raymond Wright about coming to Anchorage?

A. Yes, he said that—on Friday evening when we left work he said that we were going to leave the following day at 1:00 o'clock. That was Thursday evening he said that we was going to leave the following day at 1:00 o'clock.

Q. That would be Friday at 1:00 o'clock?

A. Right.

Q. And did you in fact leave the following—did you leave Fairbanks the following day at 1:00 o'clock, sir?

A. No, we did not.

Q. When did you leave?

A. Oh, about 1:45 because Dewey Taylor was late. He hadn't showed up.

Q. And did you proceed from Fairbanks to

(Testimony of John Walker.)

Anchorage, sir?           A. Yes, we did.

Q. And when you say we, who do you mean, sir?

A. Raymond Wright, Dewey Taylor, and myself. [408]

Q. And whose car did you come down in, if you know?

A. I presume it was Raymond Wright's car. It was a Plymouth, two-tone.

Q. And did you have any conversation with the defendant Wright on the way down to Anchorage about what you were to do after you got in Anchorage?           A. No.

Q. What time did you arrive in Anchorage, Mr. Walker?           A. Late Friday night.

Q. And what happened then, if anything?

A. We stopped at the H&M and had a couple of drinks.

Q. When you say we, who do you mean?

A. Raymond Wright and myself. I think Dewey Taylor was out in the car asleep.

Q. And what happened next, if anything?

A. Oh, we were driven over to a place to get a room. I think the fellow's name was Uncle John. He lives between 17th and 18th, if I am not mistaken.

Q. Now, this was on Friday night or early Saturday morning?           A. Yes, it was.

Q. Now, did Raymond Wright stay with you that night?

A. No, he did not. Dewey Taylor and I slept together.

(Testimony of John Walker.)

Q. Do you know where he stayed? When I say "he," do you know where Mr. Wright stayed?

A. No, I couldn't positively state. [409]

Q. Now, when, if ever, did you ever see Raymond Wright again? A. Saturday morning.

Q. That would be the next morning?

A. Yes.

Q. And would you tell us when you saw him or where you saw him?

A. Well, he picked Taylor and I up and we went and had breakfast.

Q. And what happened after that, sir?

A. Well, he made a telephone call. He tried to call someone and they didn't answer, I mean, he couldn't get the party that he was calling.

Q. Did he say where he was trying to call?

A. He was trying to call James Ing, he said.

Q. And did he say where?

A. No, he did not.

Q. All right. Did he at that time leave a call?

A. He left a message that he would call back.

Q. And did he subsequently make another call?

A. Yes, he did.

Q. And do you know who he called on that occasion? A. I do not know.

Q. And what happened next, if anything, sir?

A. Well, the three of us got in the car and drove to Fifth and Gambell and Raymond Wright got out of the car and went in the hotel there, went in by the drug store, I presume it was a hotel because I



(Testimony of John Walker.)

think there is a hotel there behind the [410] drug store.

Q. Yes, sir. What happened next?

A. Then he came out and he had a package and within this package was an identification with Thomas A. Brown on it and he gave it to me with some checks.

Q. And did this identification card have a picture on it?

A. Yes, it had a picture of myself.

Q. Was this the same picture that was taken up in Fairbanks with the polaroid camera?

Mr. Kay: I think he has gone far enough on leading questions. Objection.

The Court: Objection sustained.

Q. (By Mr. Plummer): Had you previously seen that picture?

A. I presume it was the same.

Mr. Kay: Request the answer be stricken.

The Court: Objection sustained and it may be stricken from the record. The jurors are instructed not to consider the presumption of this witness. You may proceed.

Q. (By Mr. Plummer): I will ask you then, sir, had you previously seen this picture that was affixed to the identification card?

A. I saw it—in fact, I saw a picture of myself.

Q. Attached to the identification?

A. Yes. [411]

Q. All right. What next, if anything happened, sir?

(Testimony of John Walker.)

A. Well, the card had a "laborer and social security number, Thomas A. Brown, picture of myself, and a serial number," I believe. I am not positive.

Q. All right. Was Mr. Taylor along with you at this time?      A. Yes, he was.

Q. Was he given anything that you know of?

A. Yes, he was given an identification card and some checks also.

Q. And what happened next then, sir?

A. We drove out to Spenard.

Q. And after arriving in Spenard what did you do?      A. We started cashing checks.

Q. And had you received any instructions from anybody about what you were to do if they were to inquire as to your place of employment?

A. Yes, it was suggested that—by Wright that we had been working on a site up by Point Barrow.

Q. And would you tell the Court and jury how you were dressed, sir?

A. I was dressed in combat boots and a pair of Army fatigue pants and a plaid shirt.

Q. All right. Did Mr. Wright give you any further instructions before you cashed the checks?

A. Well, all he said, "Just be sure that you don't spend too [412] much money out of the check."

Q. Now, when you negotiated these checks what, if anything, did you receive?

A. Received merchandise and the remainder in cash.

(Testimony of John Walker.)

Q. Would you tell me what you did with the merchandise? A. We put it in the car.

Q. And when you say the car, is that—whose car was it? A. It was Wright's car.

Q. And what did you do with the cash?

A. Well, we—when it would get too bulky in our pockets we'd give it to Ray to keep.

Q. That would be Mr. Wright? A. Yes.

Q. Could you tell me how many checks you cashed in all that day, if you know, sir?

A. Saturday?

Q. Yes, sir.

A. I am not—I couldn't positively state, no.

Q. Could you give us an approximation?

A. I will say about 10, 15.

Q. Did you stay in Anchorage the following day, that is, Sunday? A. Yes.

Q. Would you tell us what you did on Sunday, sir?

A. The same procedure as Saturday afternoon. [413]

Q. And would you be a little more specific. Would you tell us what you did, for the sake of the record? A. We proceeded to cash checks.

Q. And were you hauled out there by the defendant Wright? A. Yes.

Mr. Hepp: I object to that unless—he says, "hauled out there." I don't know what he means, hauled out there.

The Court: Objection sustained.

Mr. Plummer: I am sorry. I will rephrase my question.

(Testimony of John Walker.)

The Court: You may do so.

Mr. Hepp: I believe it's leading also.

The Court: Do you object because it is leading?  
(Pause.) You may proceed, Mr. Plummer.

Q. (By Mr. Plummer): Could you be more specific about your activities on Sunday as to where you went and what you did and how you went?

A. We were driven to different sections of the City of Anchorage and the surrounding territory and cashed checks.

Q. And who were you driven by?

A. Raymond Wright.

Q. And were the checks that you cashed Morrison-Knudsen payroll checks?

A. The same as before.

Q. And they were false and forged?

Mr. Hepp: I object to that as calling for a conclusion. [414]

The Court: Objection sustained.

Q. (By Mr. Plummer): Now, when, if ever, did you return to Fairbanks, Alaska, sir?

A. I returned to Fairbanks Monday.

Q. And do you recall about what time?

A. It was in the evening.

Q. And when you say we, who do you mean, sir?

A. Taylor, Wright and myself.

Q. And did you have any conversation with the defendant Wright on your way back to Fairbanks from Anchorage about the operation just completed in Anchorage?

A. Oh, there was gayety between the three of us because the operation had went off smoothly.

(Testimony of John Walker.)

Q. Now, did you make any stops along the highway on the road back to Fairbanks, sir?

A. Yes, we stopped at Palmer and cashed some checks there.

Q. All right. Any other stops, sir?

A. Yes, we stopped to get gas and I think we had something to eat.

Q. Did you stop at any place away from some establishment?

A. Yes, we stopped up by a glacier and we were overlooking a glacier and that is where we burned the articles of apparel that I had been wearing and also the identification cards.

Q. And was Mr. Taylor present at that time?

A. Yes, the three of us were there. [415]

Q. Did he make the fire?

A. Yes, he had a fire of his own. He had one and I had one and myself, also.

Q. And how about Mr. Wright, did he have a little fire too?

A. Yes, he had one too.

Q. For the same purpose as yours?

A. Yes.

Q. Now, did you make any other stops prior to arriving in Fairbanks, sir?

A. We stopped—he asked if—there was a car coming south when we were going north and we stopped and presumed that we recognized someone in the car.

Q. Did you in fact do so?

A. Yes.

Q. And who was the party you recognized?

A. Oh, three people going hunting.



(Testimony of John Walker.)

Q. And who was the party that you thought you recognized?

A. A person by the name of Porter and Burge and I don't know the other fellow.

Q. And after the car had stopped did you get out of your car? A. Yes, we did.

Q. Did they get out of their car?

A. I think one of the fellows stayed—two of the fellows stayed in the car that Burge was driving.

Q. What did Mr. Burge do, if anything? [416]

A. Oh, he got out and walked over to where we were, where we were parked.

Q. And did you have some conversation with him?

A. Not directly. The conversation was general.

Q. And did you get anything out of your car and give to Mr. Burge on that occasion?

A. I got a bottle of whiskey that hadn't been opened and opened it and we had a drink out of it.

Q. And did Mr.—was Mr. Wright there at the time that you got the whiskey and so on?

A. Yes, he was in the immediate vicinity, yes.

Q. And I wonder, would you be good enough to tell me, sir, if he and Mr. Burge had any conversation?

A. Well, the conversation was general. I think the three of us were talking and—but between Wright and Burge the conversation was more general. I think I walked over to the car and—in fact, I did walk over to the car that, Burge's car and offered these fellows in there a drink.

(Testimony of John Walker.)

Q. And did Mr. Wright do anything prior to your leaving the car that you had been riding in?

Mr. Hepp: I object to that. I don't understand the foundation to anything—I think it must relate some way to the issues here. This has been a rambling account and I hesitate to object, but——

The Court: I presume it's relevant, isn't it, Mr. Plummer? [417]

Mr. Plummer: Yes, sir, it certainly is.

The Court: Well, the objection will be overruled if it's relevant.

Mr. Plummer: I will try to make it more specific to make it less objectionable to Mr. Hepp.

Q. (By Mr. Plummer): Did Mr. Wright take any action with any object in the rear seat of the car at this time?

A. Well, in the car itself, yes; a small—same case that the camera had been in, yes. He opened it up and there was a lot of money in it and he showed it to Burge.

Q. Now, did you testify previously that the money that you had got for negotiating these checks you had given to Mr. Wright, is that correct?

A. Yes.

Q. Now, did you proceed on to Fairbanks, Alaska, sir? A. Yes.

Q. And what did you do, if anything, after you arrived in Fairbanks?

A. We unloaded the car of all the merchandise that was in it.

Q. And where did you unload it, sir?

(Testimony of John Walker.)

A. We put some in the cabin and some upstairs.

Q. Where, though?

A. At the Beachcombers.

Q. And is that where Mr. Wright lives? [418]

A. Yes.

Q. And what next happened, if anything, sir?

A. I, immediately after getting the stuff out of the car—well, the money was put on the bed and counted out and Mr. Wright gave me approximately \$1,500.00, and gave Taylor—I don't know. He gave him some money. And I asked Taylor would he take me out to the airport, International Airport there in Fairbanks.

Q. And did he do so?                      A. Yes, he did.

Q. And what happened when you arrived at the airport, if anything?

A. I was just about three minutes too late to catch the plane going to Seattle that night.

Q. And did you and Taylor—what did you and Taylor next do then?

A. We drove back to the cabin in which I was living and I put my bag inside and then the conversation came up that he was going to drive out and I says, "Well, inasmuch as I can't get a plane for two or three days I will drive out with you."

Q. And did you in fact do so?

A. Yes, I did.

Q. Now, Mr. Walker, have you ever been convicted of a crime?                      A. Yes.

Q. Would you tell me where and when and for what crime? [419]

(Testimony of John Walker.)

A. I was convicted at Naknek, I believe, in September, 1955, for disorderly person.

Mr. Plummer: May I have just a minute, your Honor?

The Court: You may.

Mr. Plummer: I have no further questions, your Honor.

The Court: You may cross-examine.

Mr. Kay: May we have the usual recess at this time?

The Court: Without objection the Court will take a 10-minute recess.

(Thereupon, at 3:15 o'clock p.m., following a 10-minute recess, the court reconvened and the following proceedings were had:)

The Court: Let the record show all the jurors are back and present in the box. You may proceed with your cross-examination, Mr. Kay.

Mr. Kay: Thank you, your Honor.

### JOHN WALKER

testifies as follows on

### Cross-Examination

By Mr. Kay:

Q. Mr. Walker, you have from time to time used the name of Youngblood in addition to the name of Walker, have you not?

A. No, I merely used the name Youngblood.

Q. Haven't you? [420]

(Testimony of John Walker.)

A. Individuals have called me that.

Q. I see. So that you are known to some people as Youngblood? A. Yes.

Q. Rather than Walker, both here and in Fairbanks, isn't that true? A. Beg your pardon?

Q. Wouldn't that be true, both here and in Fairbanks, Mr. Walker? A. Yes.

Q. Do you use any other names or have you used any other names? A. No.

Q. In answer to a question by Mr. Plummer you said you had been convicted of, I believe it was, being a disorderly person at Naknek several years ago? A. Yes.

Q. Do you have any other convictions of crime, Mr. Walker? A. Crime?

Q. Yes, have you been convicted of any other crime? A. Misdemeanors. That is all.

Q. Misdemeanors such as?

A. Well, I was in a gambling house and drinking.

Q. On several other occasions?

A. Not on several occasions, no.

Q. I see. But you do have some other convictions for misdemeanors that you can't recall the exact details on at this time, is that right? [421]

A. Yes.

Q. And then you have, of course, you pleaded guilty and have a conviction in this case on several counts in this indictment, is that correct?

A. Yes.

Q. Now, when were you—you have testified that



(Testimony of John Walker.)

you left Alaska thereafter in September of 1956.

Where did you go from Alaska, Mr. Walker?

A. Seattle, Washington.

A. And did you remain in Seattle then for some time?

A. Until I returned to the Territory.

Q. When were you first arrested in connection with this charge, Mr. Walker?

A. February, 1957.

Q. February of 1957?

A. Yes.

Q. And how long did you remain in custody at that time, sir?

A. Until the latter part of April or the first of May.

Q. From February to May then you were in custody here at the federal jail in Anchorage, Alaska, is that right?

A. Yes, I was.

Q. And then what happened? Were you released on bond?

A. Yes, I was.

Q. And how long did you remain out on bond then?

A. Until my return to Alaska this time. [422]

Q. When was that, Mr. Walker?

A. Monday a week ago.

Q. A week ago Monday?

A. Yes.

Q. During that interval, between the time you were released over here and the time you returned last Monday where were you, sir?

A. Seattle, Washington.

Q. Now, have you made any previous statements to the police in connection with the offense with which you are charged here, Mr. Walker?

A. Did I make any?

(Testimony of John Walker.)

Q. Yes. A. Previous statements?

Q. Yes, before testifying here today.

A. Yes, I did make a statement.

Q. And when did you make that statement, sir?  
About when?

A. I made a statement on the day that the officers interrogated me in Renton, California—I mean, in Renton, Washington. I beg your pardon.

Q. When was that, Mr. Walker?

A. That was in February of '57.

Q. In February of 1957 you made a statement, is that right? You don't recall to whom that was made?

A. I believe to Lt. Trafton and—— [423]

Q. That is Lt. William Trafton of the Territorial Police?

A. Yes, and I can't recall the individual that was with him. I think that—I am almost positive that he was a fire investigator.

Q. Would that be a Mr. Harkabus?

A. Beg your pardon?

Q. Ed Harkabus, would that be the name?

A. I am almost positive.

Q. That is one statement that you made in Renton in February, 1957. Have you made any other written statements or oral statements which were reduced to writing and then shown to you?

A. Yes, I made the statement before the grand jury.

Q. I see. That, however, was just oral testimony, was not written testimony, was it? I mean, it wasn't reduced to writing and shown to you?

(Testimony of John Walker.)

A. I don't know whether they reduced it to writing then—I am almost positive it was took down by a stenographer.

Q. It probably was, but it wasn't later typed up and shown to you was it? A. Yes.

Q. Oh, it was your testimony before the grand jury, and how about any other statements? Now, have you made any statements since?

A. That is the statement. [424]

Q. Those are the two.

Mr. Kay: At this time I'd like to request your Honor that in accordance with the statute, the statements previously made by this witness reduced to writing and shown to him be handed to me for my examination.

Mr. Plummer: We have the statement which was made. I don't know that we have the grand jury testimony transcribed or not and if we do have I resist showing it to the defense because it's not within the purview of the statute. We have a special statute on it.

The Court: Mr. Walker, did you sign any statement that you may have made before the grand jury?

A. I can't positively state. I can't positively state whether I did or not. I am not sure.

The Court: How many statements did you sign, if you know?

A. Just the one.

The Court: Well, you have had handed to you this one statement.

Mr. Kay: Yes. Now, at this time, again in ac-

(Testimony of John Walker.)

cordance with the statute, just a few minutes in which to examine the statement to see if I wish to use it in any way.

Mr. Plummer: May I inquire of Mr. Walker if this is the only statement that he signed?

The Court: I have already done that, counsel.

Mr. Plummer: Fair enough. I just wanted to be [425] proper, your Honor.

Mr. Hepp: I might ask Mr. Plummer if he has a copy that I could study. It's going to eliminate a little time waste.

The Court: Do you have an extra copy?

Mr. Plummer: He can have it until court starts. If court starts and counsel wishes to interrogate, of course, I'd like to have it.

The Court: Yes. Let the record show an extra copy has been handed to Mr. Hepp at this time.

Q. (By Mr. Kay): Mr. Walker, am I correct that this statement that I have just examined was made here in Anchorage or was it made in Renton, Washington?

A. The statement that I signed was made here in Anchorage.

Q. I see. About the first of March?

A. I don't know the date when it was made or I don't know the date it was signed, but I was taken before the Commissioner, I believe, and had it notarized and I signed it.

Q. And you had been in custody a week or so at that time?

A. I don't know how long I had been in custody.

(Testimony of John Walker.)

Q. During this—at that time—let me ask you this, Mr. Walker. At the time you gave this statement did you have any indication from anybody on the staff of the United States Attorney or the United States Attorney himself as to whether or not—or did you at that time indicate that you intended to plead [426] guilty to the offenses which you were charged?

A. At the time I made the statement?

Q. Yes.           A. No.

Q. When did you decide, later decide then to enter a plea of guilty?

A. When I found out that I was on my own and there was no other way I could possibly get out of this unless I did.

Q. No other possible way you could get out of it unless you did, is that your testimony?

A. That's right.

Q. When was that, that you discovered that that was the only way out?

A. After I had been in jail over a few days, over a week.

Q. Is that—you mean back in February of '57—

A. Yes.

Q. (Continuing): —or this trip? I see. Well, then, you made up your mind to enter a plea of guilty at that time clear back in February of 1957?

A. When I didn't get out of jail as I had been promised I would be, yes.

Q. And you didn't actually enter a plea of guilty, however, until after you returned here to



(Testimony of John Walker.)

Alaska this—just before the trial of this case, is that right?

A. That's when I entered the plea. [427]

Q. Now, during the time that you were out on bail then, before you returned here to Alaska, did you have any correspondence with the United States Attorney's office concerning a plea of guilty?

A. No, I did not.

Q. Didn't make up your mind to enter—did you have any conference with them at all, Mr. Walker?

A. Yes.

Q. Letters exchanged back and forth between you and the United States Attorney's office during that period or just a letter from them or what?

A. I was inquiring as to what would be the possible date of my trial.

Q. And you got a reply to that, did you?

A. Yes.

Q. And any discussion in those letters of your entering a plea of guilty? A. No.

Q. None whatever. When did you discuss with the United States Attorney's office, anyone in that office, the fact that you had decided to enter a plea of guilty, Mr. Walker?

A. I decided when I came back up here that I would enter a plea of guilty. I had already made the statement prior to that time.

Q. Well, you just testified that you had already made up your [428] mind to enter a plea of guilty quite a bit earlier back in February, but when you got back up here this time that is the first time you

(Testimony of John Walker.)

discussed it with the United States Attorney's office?

A. I did enter the plea then, yes.

Q. Now, did you have any indication of what your probable sentence would be in return for your entering a plea of guilty and your testimony in this case, Mr. Walker?

A. No, I did not.

Q. No indication from them at all, is that right?

A. No.

Q. Did they indicate that they would recommend more leniency in your regard than anyone else or give you to understand anything along that line?

A. No, because when I went before the grand jury I stated my case before them and I told them that I was inadvertently involved in a crime and the only reason I was involved was my family was at stake; in fact, they were practically destitute at the time and I was helpless and I just entered into it.

Q. Well, then, you didn't—I take it that you do hope for some consideration or some leniency in this case in view of your cooperation?

A. No, I can't say that I will get it.

Q. You don't even have any hope?

A. I couldn't anticipate it, no, because—— [429]

Q. Well, a hope springs eternal in a human breast. Wouldn't you be candid enough to admit——

A. Well, there is such a thing, yes.

Q. You do entertain such a hope, do you not, perhaps reasonably enough?

A. According to the life I have lived and I

(Testimony of John Walker.)

haven't been involved in any crimes, I don't see any reason why that I shouldn't try and ask for probation or a leniency of the Court.

Q. But they haven't made any indication to you that that is going to be their recommendation in view of your testimony? A. No.

Q. Did Mr. Duggar or anybody in the office warn you to be sure to testify that there had been no deals of any kind made with the United States Attorney's office?

A. Mr. Duggar? I don't know him, I don't believe.

Q. You haven't interviewed with him down here getting ready for this case? A. No.

Q. Well, you have had a number of conferences with the United States Attorney and members of his staff in preparation for your testimony, haven't you? A. Number of conferences?

Q. Yes. A. No. [430]

Q. At least one, shall we say?

A. Yes, I read the statement that I had made.

Q. Well, you were over there at the United States Attorney's office the other night for several hours, were you not, the same evening that Mr. Taylor—you and Mr. Taylor?

A. Several hours?

Q. Yes. A. No.

The Court: Pardon me, counsel. Would you give the Court just a few moments to make a phone call. Court will go into recess for one moment, please.

(Testimony of John Walker.)

(Thereupon, following a short recess, court reconvened and the following proceedings were had:)

The Court: Let the record show all the jurors are back and present in the box. You may proceed, Mr. Kay. Thanks for the consideration.

Mr. Kay: Yes, indeed.

Q. (By Mr. Kay): Mr. Walker, I was asking you about your conferences——

Mr. Plummer: Your Honor, I don't see the defendant, Charles E. Smith.

The Court: Very well.

Mr. Plummer: I am sorry to interrupt.

The Court: Thank you. Let the record show Mr. Smith [431] has returned. Thanks, Mr. Plummer.

Q. (By Mr. Kay): I was asking you about what conferences and meetings you have had with the office of the United States Attorney in preparation for your appearance here today, Mr. Walker, and I believe you testified that you did spend some time one evening last week over at the office, is that correct?      A. Yes, I did.

Q. And you were examined at that time about what your testimony would be here today?

A. I just read this statement that I had made.

Q. How long were you there, Mr. Walker?

A. You said several hours, and I was only there a little over an hour, I think.

Q. Well, I won't quibble about the time. You weren't there continuously between 8:00 and 11:00?

(Testimony of John Walker.)

A. I don't know the time.

Q. But you were there, in your opinion, more than an hour, at least? A. Yes.

Q. It's your testimony that all you did was read over that statement?

A. That's all I did, yes.

Q. The rest of the time, what did you do, just sit there and talk about other things? [432]

A. I re-read the statement to see if it was the same statement that I had made, yes.

Q. At the same time, I believe, Mr. Walker, when I called the jail and asked if you would be good enough to talk to me briefly about the case you refused, did you not? A. Yes, I did.

Q. And you refused with rather obscene and profane language, the message you sent to me, was it not? A. No. The first time?

Q. Yes, the first time I called you and asked if you would be good enough to talk to me didn't you send me a rather obscene message back?

A. No, I didn't.

Mr. Kay: Your Honor, I hesitate to shock anyone in the courtroom, but I feel that it's necessary to ask this question.

The Court: Well, in that respect, counsel——

Mr. Kay: Perhaps it's on an irrelevant point.

The Court: It's on a collateral matter.

Mr. Kay: Probably would not be a matter of impeachment if I did ask it. The witness has denied it, in any event.

The Court: Very well. You may proceed.



(Testimony of John Walker.)

Q. (By Mr. Kay): Mr. Walker, you said a minute ago that you had mentioned the fact that your family had been—you got into this crime because your family was so poorly off. As a matter of fact, [433] your occupation has been that of a gambler, has it not, for a number of years?

A. No. My occupation has been that of a seaman cook first class.

Q. When is the last boat you went out on, Mr. Walker?      A. LST-618.

Q. And when was that?      A. 1956—1955.

Q. In 1955?      A. Yes.

Q. And how many days did you spend at sea during the year 1955?

A. I was on a resupply mission to the dewline.

Q. And how many days did you spend at sea during 1955?

A. I can't recall. I have it in my discharge record book.

Q. Isn't it also a matter of fact that your purpose in getting these jobs on boats at sea was to take the decree in their gambling games?

A. No.

Q. That was your hope, let's say, referring again to hope, when you shipped on these trips that you would profit by gambling?

A. I quit gambling when my wife become pregnant with my first daughter.

Q. And when was that?      A. 1947.

Q. You haven't gambled since? [434]

(Testimony of John Walker.)

A. I quit. I have gambled since, yes. Do you wish me to relate the circumstances?

Q. No. When you were first picked up you were questioned extensively about the relationship with Mr. Ing on this matter, were you not?

A. No, I was not.

Q. Isn't it a fact that the interest of Mr. Harkabus and these other officers when they picked you up was concentrated on Mr. Ing?

A. They didn't pick me up. They interviewed me at Renton, Washington, and I didn't see them again until the following week.

Q. They didn't arrest you at that time?

A. No, they did not.

Q. At that time did you deny any complicity in this check matter?

A. They asked me did I know about it and I told them no.

Q. And they asked you also if you knew Ing and if Ing had anything to do with it?

A. No, they did not. They didn't ask me anything concerning Ing and the check. They asked me about some fires in Fairbanks and I told them I didn't know anything about them.

Q. You didn't mention Ing's name during that conversation?

A. Yes, concerning some fires and I didn't know anything about it.

Q. And they asked you about Ing and repeatedly about that, did [435] they not? A. Yes.

Q. Then when they finally got around to this

(Testimony of John Walker.)

check matter they again went into—right away went into the question of Ing, whether Ing had any connection with it, did they not?

A. I don't recall.

Q. Well, you wouldn't deny that that is a fact, would you?

A. I don't know. I don't recall.

Q. Mr. Walker, you have testified concerning your last trip as a seaman. As a matter of fact, on that you jumped ship on the way back to Seattle, did you not?

A. Remain here in the Territory. I beg your pardon, no.

Q. Just one more question, Mr. Walker. You testified concerning a conversation at the Beachcombers on an occasion, I didn't get the date, but it was apparently around August 29th or 30th when Mr. Ing came by the Beachcombers and picked up Wright and was gone for 15 or 20 minutes?

A. I didn't testify to that, no.

Q. I am sorry. You correct me in respects in which I was mistaken.

A. Yes.

Q. Please.

A. It was this building that Mr. Wright was building that I was helping construct.

Q. I see. At that location. All right. Now, was anyone else [436] present on that occasion?

A. Yes, there were individuals in the house.

Q. As a matter of fact, there were a couple of girls there, were there not, or women?

A. Yes.

(Testimony of John Walker.)

Q. And isn't it a matter of fact, Mr. Walker, don't you recall that Mr. Ing had brought with him a check which had been taken, given, or transacted, handed over by one of those girls, or through one of them over at the Big Ben Liquor Store and he was there to see if he could get the money out of Wright, some discussion between he and Wright over that check? A. No, I don't.

Q. You don't recall that?

A. No. No, I don't recall that.

Q. In any event, on no occasion here, I believe you testified, at least I gather from your testimony that on no occasion here did Ing have anything to say about these checks or this easy money?

A. I don't know whether I testified to that fact or not, but I didn't hear him say anything about checks.

Mr. Kay: I believe that is all.

The Court: Very well. Mr. Hepp, do you have any questions? [437]

### JOHN WALKER

testifies as follows on

### Cross-Examination

By Mr. Hepp:

Q. How old are you, Mr. Youngblood?

A. John Walker is my name.

Q. Excuse me. Mr. Walker.

A. 57 years old.

Q. I gather from the statement that you made

(Testimony of John Walker.)

that you are married? A. Yes, I am.

Q. And have a family? A. Yes.

Q. Where do they reside?

A. Seattle, Washington.

Q. Have they resided continuously there for some time? A. Yes.

Q. How long?

A. Since 1947. That is, my family.

Q. Yes. How long have you been in the Territory of Alaska generally, I mean, excluding just visits or trips Outside.

A. How long have I spent in the Territory?

Q. Yes.

A. On one occasion I think I spent two months here. I came here in December and I left in February. [438]

Q. Well, when was the first—what year was the first trip that you made into the Territory of Alaska? A. 1951 or two, I believe.

Q. You have been here intermittently, that is, off and on since that time, is that right?

A. No, I was only here on two occasions that I was—when I was aboard ship.

Q. Which ships were those?

A. The SNS-Valentine and LST-ESNS.

Q. Are you connected with services of some kind?

A. Military Sea Service, Transportation Service.

Q. And it's your testimony that you followed that occupation during most of your adult life?

A. No, that was not my testimony, no.

Q. What would be your testimony concerning



(Testimony of John Walker.)

the principal occupation since you have become an adult?      A. Well, I was in business.

Q. What kind of business?

A. A catering business and I also had a number of restaurants.

Q. And where did all this occur?

A. Well, some in California, one in Seattle, Washington, catering business in Omaha, Nebraska.

Q. Where were you originally born, sir?

A. Darby, Delaware County, Pennsylvania.

Q. And how long after that did you move to the West Coast? [439]

A. I came to the West Coast in 1923.

Q. You spent the principal portion of your life since then on the West Coast?

A. Yes, I have.

Q. I gather you have lived quite a few places though in your life, is that right, moved around to some extent?      A. No, not moved around, no.

Q. Well, a seaman goes many places, does he not?

A. But that is not living. I beg your pardon.

Q. Oh, I see. Well, you traveled quite a bit then, is that right?

A. Yes, I have been around the world a number of times.

Q. Have you gambled quite a bit on these trips?

A. No, not quite a bit. I have gambled, yes.

Q. Well, is your gambling a serious nature or just a small friendly game, as we sometimes think of it?

(Testimony of John Walker.)

A. Just what do you mean as a serious nature?  
As a livelihood?

Q. Yes. To bridge a lack of employment, for instance.

A. At one time I was a professional gambler, yes.

Q. In fact you ran a gambling establishment up at Fairbanks known as Club 11 during a period of time, is that right?

A. No, I did not.

Q. What was your affiliation with the Club 11?

A. My affiliation with the Club 11 was I was a dealer there.

Q. Well, what did you deal? [440]

A. Dice and also blackjack.

Q. What year was that?

A. The same year of this action.

Q. Would you state the year, please?

A. 1956.

Q. So that I can understand the prior statement, would you call that serious gambling, dealing dice?

A. If you will recall, when Mr. Kay asked the question——

Q. Just answer my question, please?

A. Beg your pardon?

Q. Would you consider your activities at the Club 11 as serious gambling? Just answer it, please.

A. Definitely, yes.

Q. How long have you known Raymond Wright?

A. For about a period of 10 years or more.

Q. Has that been principally in the Territory of Alaska or divided up among several areas?

(Testimony of John Walker.)

A. I knew him for a short spell in Seattle, Washington, and I knew him during the period that I was in Fairbanks.

Q. To your knowledge, how long has Mr. Wright resided in Fairbanks or in that area?

A. How long has he resided there?

Q. Yes, to your knowledge?

A. I couldn't state that. I don't—

Q. Would you hazard a guess, please? [441]

Mr. Plummer: I object. He has already said he didn't know, your Honor.

The Court: Objection sustained.

Q. (By Mr. Hepp): Could you state that he had lived there, to your knowledge, more than three years? A. I am almost positive he did.

Q. More than four years?

A. I don't know.

Q. Do you know Dewey Taylor?

A. Yes, I know him.

Q. How long have you known Dewey Taylor?

A. I met him after June 22, 1956.

Q. Could you state whether you got on with him quite well or not so well, I mean, in a friendship basis?

A. There is no friendship involved because he is just an acquaintance of mine.

Q. At the time of this Labor Day incident, where in Fairbanks were you living?

A. In one of the cabins at the Beachcombers.

Q. Is that Mr. Wright's place? A. Yes.

Q. Was that also the cabin that you stated that

(Testimony of John Walker.)

you had unloaded some of this stuff that you had bought?

A. Yes. [442]

Q. Are you pretty good friends with Wright then?

A. Yes, we were.

Q. And previously?

A. And previously.

Q. Have you always, up until the last six months, say, been on good terms with Raymond Wright?

A. We were on good terms, yes. We were on good terms until he promised to get me out of jail and refused.

Q. You became intensely angry with him then, is that right?

A. Wouldn't you?

Q. Have you ever discussed this matter, this incident, this Labor Day incident with Mr. Dewey Taylor prior to the last few days here?

A. Did I discuss it with him?

Q. Yes.

A. No.

Q. Well, come now, Mr. Walker, you must have discussed it at a time when you testified that you and Mr. Taylor came down from Fairbanks in a car? You said you talked all the way down and were very jovial on the way back. You discussed it then, didn't you?

A. Well, if that is what you mean.

Q. Well, I asked you if you had ever discussed it with Mr. Taylor.

A. I—you said the last—within the last few days.

Q. I said excluding the last few days. [443]

A. The answer is yes.

Q. We will start all over again.

A. Okay, rephrase the question.

(Testimony of John Walker.)

Q. Prior to the last, or excluding the last few days or week, had you ever discussed this matter with Mr. Taylor?      A. Yes.

Q. Now, was that a discussion limited during the time, the immediate time when it happened?

A. Well, we talked about it on the highway down to Seattle.

Q. In fact, you talked about it quite a bit with him from that time and since, is that right?

A. Not quite a bit, no.

Q. Well now, isn't it a fact, Mr. Walker, that Mr. Taylor in fact stayed at your place in Seattle when he was there, is that right?

A. That's correct.

Q. Real good friends?

A. No, not real good friends.

Q. Just friends?

A. No, not friends; just acquaintances.

Q. Is it a custom of yours to bring acquaintances to live with you and your family?

A. No, it is not a practice of mine.

Q. But you made an exception in this case?

A. My wife did. [444]

Q. Well, did she know Mr. Taylor?

A. No, she did not, not prior to returning to Seattle.

Q. Did I understand, or did you testify in connection with whether or not you had been sentenced on your plea of guilty in this charge? I can't recall the testimony. If you will just, please state whether you had or——

A. I said——



(Testimony of John Walker.)

Mr. Plummer: I object. The question is repetitious. At the start of the trial there was an agreement made between counsel that on cross-examination the same field would not be covered and Mr. Kay covered it at some length.

The Court: That is correct.

Mr. Hepp: Well, excuse me. If Mr. Plummer insists, I will request then, if I can't recall a piece of testimony, to have the Reporter spend 15 minutes or half an hour to go back——

The Court: Supposing you discuss it with Mr. Kay for a moment. Maybe he can help you.

Q. (By Mr. Hepp): Mr. Kay informs me that he did in fact ask you that question. Do you now know, Mr. Walker, when you are going to be sentenced in this matter? A. Do I know?

Q. Yes. A. No, I do not.

Q. Have you had any discussions with Mr. Plummer or any of his [445] staff in connection with your sentencing? A. No, I have not.

Q. Did Mr. Taylor in any of his discussions with you make any statement to you indicating that he was expecting a suspended sentence?

A. Mr. Taylor did not, no.

Q. Are you hopeful of getting a suspended sentence out of this case? A. I hope so, eternal.

Q. I believe that was the phrase that counsel used.

A. Did he? I am sorry. I didn't hear him.

Q. I have just a few other questions. I believe you made—you testified concerning either you tak-

(Testimony of John Walker.)

ing Mr. Taylor, or Taylor taking you out to an airport in Fairbanks, International Airport?

A. Mr. Taylor took me out there in his car.

Q. In whose car? A. In his car.

Q. What kind of car did Mr. Taylor have?

A. An Oldsmobile.

Q. But you missed the plane, is that right?

A. I did.

Q. And drove to the states? A. Yes.

Q. When did you become acquainted with Mr. Volk, I believe you [446] mentioned the name Volk?

A. No, I did not.

Q. Was there a name——

The Court: It was used by Mr. Dankworth.

Mr. Hepp: Oh, excuse me.

Q. (By Mr. Hepp): Do you know Mr. Volk?

A. No, I do not.

Q. Do you know anybody who purports to be that or somebody who has been called Mr. Volk? Do you know any person that is referred to by that name? A. No, I do not.

Q. Is it your testimony that you didn't meet a Mr. Volk out at the Club 11 then? Just yes or no, sir.

A. If I met him I don't recall. I don't remember the name.

Q. You have no conscious recollection of anybody named Volk? A. No, I do not.

Q. Or Johnny Volk or John Volk? Would that—your answers be the same to the questions if I had

(Testimony of John Walker.)

added the name John Volk instead of just Mr. Volk?

A. I can't recall the name Volk. I don't—I mean, it just doesn't ring any bells.

Mr. Hepp: May I have just a moment?

The Court: You may.

Mr. Hepp: I believe that is all the questions I have. [447]

The Court: Mr. Nesbett?

Mr. Nesbett: No.

The Court: Very well. Any redirect, counsel?

Mr. Plummer: Just a couple of questions, your Honor.

### JOHN WALKER

testifies as follows on

### Redirect Examination

By Mr. Plummer:

Q. Now, after your arrival in Seattle did your wife rent a room to Dewey Taylor?

A. Yes, she did over my protestations. He had been living at the Frey Hotel and seemingly he was running short of money and he was by the house one afternoon and I was showing him around the place and I have a semi-room in the basement; in fact, it's a bed and all it needs is the walls. There is some curtains around it and he said, "Why didn't you tell me that you had this before?" He said, "I could have rented a room from you." I said, "Well, I am not in the habit of having individuals live in my home." So my wife said, "Oh, you might as

(Testimony of John Walker.)

well go ahead and rent him a room. You took a chance on him killing you coming down the highway." So she did.

Q. If he was a guest, he was a paying guest?

A. Yes, he was. [448]

Mr. Plummer: I have no further questions.

The Court: Any recross?

Mr. Hepp: Yes.

### JOHN WALKER

testifies as follows on

#### Recross-Examination

By Mr. Hepp:

Q. In connection with that matter, Mr. Walker, are we to understand that here is a man that you went through a big caper with, he offered you a ride down the highway, and you rented him a room?

A. Yes, because I did all of the driving and paid most of the expenses also.

Q. I see, and rented him a room when he got there?

A. No, not when I got there. No, he lived in a hotel up-town and squandered his money and then he was practically destitute and he came there. He wound up owing my wife \$43.00 for room and board he couldn't pay.

The Court: Any other recross? Hearing none, then you may step down.

(Thereupon, the witness was excused and left the stand.)

The Court: You may call your next witness.

Mr. Plummer: May I request of counsel the witness' statement? (The statement was handed to Mr. Plummer.) I'd like [449] to call Mr. George Hooker.

GEORGE W. HOOKER

called as a witness for and on behalf of the Plaintiff, and being first duly sworn, testifies as follows on

Direct Examination

The Court: You may proceed, counsel.

By Mr. Plummer:

Q. Would you please state your name, sir?

A. George W. Hooker.

Q. And your occupation, sir?

A. Assistant Hotel Manager.

Q. And what hotel, sir?

A. Westward Inn.

Q. And were you so employed during the months of August and September of 1956, sir?

A. Yes.

Q. Did you at my request bring your records of the registration in the hotel covering the month of August of 1956 and the first part of September, sir?

A. Yes.

Q. I wonder if you would be good enough, sir, to inspect those records? (The witness did so.) Covering particularly the date of August 31, 1956?

A. This is the registration book. First the guests register on [450] a guest card.

Mr. Plummer: May I approach the witness?



(Testimony of George W. Hooker.)

A. Which I believe is in the hands of the——

The Court: You may approach the witness, then.

A. Perhaps in your hands.

Q. (By Mr. Plummer): Is this what you mean by a guest card, sir?

A. Yes. After the guest registers, it's written up on a guest ledger and we enter it in this book for our records.

Q. And those records are kept in the normal course of business?

A. Yes. This book is kept in-taut for reference and this card goes to the Westward Hotel to be filed away for permanent records; also, the guest ledger finally arrives at the Westward Hotel for permanent record.

Q. I wonder if you would be good enough, sir, to examine the date, August 31, 1956, and see if James B. Ing was a guest at your hotel on that date?

A. On August 31, 1956, we have a registration, Guest Ledger S-1-611, James Ing and Wife, Fairbanks, Room 40.

Q. Thank you. And is that reflected also on this?

A. This here is apparently the guest card and this is the guest ledger of the charges, if you wish to examine it.

Q. Now, I wonder, sir, if you'd look at your ledger card No. S-1-611 and tell me, if you can from it, how long Mr. Ing stayed with you on that occasion? [451]

A. Well, the ledger records show that he checked

(Testimony of George W. Hooker.)

in on August 31 and checked out on September 2.

Q. Thank you very much, sir. Now, I wonder if you would check to see on your ledger card S-1-611 if there is any charge for telephone calls there?

A. We have on August 31 two local calls, on September first, one local call, one long distance call.

Q. And will you tell me what the charge on that long distance call was? A. \$2.50.

Q. Would it destroy your records, Mr. Hooker, if we asked you to leave your ledger card S-1-611 here, plus the registration card? Would that destroy the continuity?

A. No, only that I presume we should have a receipt of some kind for our records for it.

The Court: The Court instructs the in-court deputy to give you a receipt for that in due course.

Mr. Plummer: Let me show them to counsel prior to——

The Court: Yes. As a matter of fact, if counsel do not object, a photographic copy could be made forthwith and they could be returned. Show them to counsel, will you please.

(Thereupon, the documents were handed to defense counsel.)

Mr. Kay: As long as the originals are available for cross-examination, your Honor. I wonder if we could take a recess before examining these or was the Court planning on taking [452] a recess. I'd suggest a 5-minute recess.

Deputy Clerk: Could they examine it and photograph it during the recess?

(Testimony of George W. Hooker.)

The Court: Yes, it will just take a moment. Suppose we go ahead and photograph it.

Mr. Kay: I just wonder if you could do that during the recess. I wanted to use the original, however, on cross-examination.

The Court: Very well. Court will go into recess for a period of 5 minutes.

(Whereupon, at 4:30 o'clock p.m., following a 5-minute recess, court reconvened and the following proceedings were had:)

The Court: Let the record show all the jurors are back and present in the box. You may proceed with your cross-examination. Have you photographic copies?

Mr. Kay: Are you through, Mr. Plummer, with your direct examination?

Mr. Plummer: I would like to do this before I complete my direct examination, I would like to offer in evidence this card and the billing sheet.

The Court: Which, let the record show, is a photographic copy of the original. Is there any objection?

Mr. Plummer: Have you had an opportunity to see it?

Mr. Kay: I haven't, no. I'd like to see the original, [453] if I could, rather than the copy. (The documents were handed to Mr. Kay.) And if I may, your Honor, then I'd like to examine Mr. Hooker a few questions about them before——

The Court: You may proceed.

(Testimony of George W. Hooker.)

Mr. Kay (Continuing): —admitting them into evidence.

The Court: Let's have the registration card as Exhibit No. 24 for identification and the financial statement as No. 25, if there is no objection, for identification only.

Q. (By Mr. Kay): Which is the small card, Mr. Hooker?

A. That is the registration card.

Mr. Kay: May I approach the witness, your Honor?

The Court: Yes, you may.

Q. (By Mr. Kay): Mr. Hooker, what are these—this information down here? I am showing the lower lefthand corner of the card.

A. That has no relation at all except that Bill Mueller is the clerk at the Westward Hotel and I presume when he gave this he must have put some information on there and what it could be, I don't know, or it may be that these cards are checked in against my transcript and it may be some records that they apply, but whatever it is I am not familiar with it.

Q. It doesn't have anything to do with Mr. Ing's registration at the hotel at that time?

A. None whatsoever; some records from the hotel and from my [454] records, and I am not familiar with that.

Q. Now, this card, referring to the registration card, just shows the arrival, the date of arrival, the room to which the parties were assigned, and the

(Testimony of George W. Hooker.)

rate, is that correct?      A. That is correct.

Q. And the clerk, I take it, who checks the party in?      A. Correct.

Q. And that was you, Mr. Hooker?

A. That is correct.

Q. All right. Now, referring to the other sheet. What do you call this? The guest account sheet?

A. Guest ledger sheet.

Q. That again shows the room number, the arrival date, and the rate, does it not?

A. Correct.

Q. Now, in whose handwriting is that guest ledger sheet made out? Is that made out at the Inn, Mr. Hooker?      A. Yes.

Q. And in whose handwriting is this particular guest ledger sheet accomplished, sir?

A. That is in my handwriting.

Q. Is it all in your handwriting?

A. No. This portion is (indicating), checking it in and this here (indicating). These figures here (indicating) are the clerk's figures, relief clerk that we had. [455]

Q. Do you know who that relief clerk was, Mr. Hooker?

A. No, I don't recall the name of that chap that was on at that time. The Westward Hotel records would show that, but it's been two years ago and I have forgotten his name now. He's not in the Territory. He's in the states, I know that.

Q. Mr. Hooker, now, you didn't check out—



(Testimony of George W. Hooker.)

check Mr. Ing and his wife out of the hotel then, did you?      A. No.

Q. You don't know of your own knowledge when they checked out or when they actually left the Westward Inn, do you?      A. No.

Mr. Plummer: This is getting into cross-examination, your Honor.

Mr. Kay: You are correct. I will desist at this point temporarily and state that I have no objection to the admission of these.

The Court: Are there any other objections? (Pause.) Hearing none, then they may be admitted and marked Government's Exhibits 24 and 25.

Mr. Plummer: And will the Court's ruling also include the stipulation with counsel that the copies may be admitted?

Mr. Kay: Yes.

The Court: Very well.

Mr. Kay: Now, may I continue then with regular cross-examination? [456]

Mr. Plummer: Yes.

### GEORGE W. HOOKER

testifies as follows on

#### Cross-Examination

By Mr. Kay:

Q. Mr. Hooker, what is the check-out time at the Westward Inn, sir?

A. 2:00 o'clock, 2:00 p.m.

Q. 2:00 o'clock in the afternoon?

(Testimony of George W. Hooker.)

A. Uh-huh.

Q. So that if a party checked out after 2:00 o'clock in the afternoon, say several hours after 2:00 o'clock in the afternoon, it would at least be the regulation of a hotel that that person be charged for the additional day?

A. Well, in some cases, yes, not always. Sometimes they will advise me they are going to leave and could they leave their bags and things in the room for another hour or two hours or sometimes until 5:00 o'clock and as long as they advise us so we can have the maid make the room up, why, we are very liberal that way, but if they—in the event they didn't advise us and deliberately took advantage and the maid has gone home and I have a room not made up I will deliberately charge them another day, yes.

Q. Right. So that we get it straight now, and the jury understands [457] it then, while there might be exceptions, as you have indicated, where a person was—knew that they were going to leave and just asked if they can leave their bags in the room so the maid could make it up, that kind of thing, you would not charge them for the additional day even though they left an hour or two hours or perhaps three hours after the check-out time?

A. That's correct.

Q. But if for some reason they didn't do those things, in other words, didn't give you any advance notice, just came in at 6:00 o'clock and check out

(Testimony of George W. Hooker.)

it would be the normal policy to charge for that additional day?

A. At that particular time of the year, yes, definitely.

Q. Yes. That is, right over the Labor Day week end?

A. Well, yes, during the busy season. In the wintertime when you are——

Q. So that on this particular week end, under those circumstances, it would be the policy to charge for the additional day?

A. Yes.

Q. Now, in such event that person—let's say that a person checked out in such fashion of 5:00 or 6:00 o'clock on the afternoon of September first, and were charged for the additional day, they'd be paid then—well, actually they'd be paid through September second, would they not?

A. Yes. [458]

Q. To the check-out time on September 2?

A. Uh-huh.

Q. I believe when I asked you about it out here in the hall, Mr. Hooker, you indicated that you, under those circumstances, would still show that person checked out on September first even though they paid for that additional day?

A. Well, yes, and that guest ledger you have in your hand there would indicate if they had checked out on the first before 9:00 o'clock. It would show it on there. If you will bring it here I will show you what I mean.

Q. That is, if you did it?

(Testimony of George W. Hooker.)

A. No. If you will bring it up I'll explain it very thoroughly and the jury can understand. Now, your Honor, examine that and——

The Court: Show it to the jury.

A. To the jury here. You see how this ledger. The first day he checked in is \$12.00 and the two phone calls is brought down. It's brought up showing the balance the following morning of \$12.30. The next evening at 9:00, between 9:00 and 10:00 we bring the charges up for the following day and put them on a transcript, as we call it, which shows the routine business of the day. Then that \$12.00 is entered and brought down and up here for the following day. Now, if he had of came along that evening prior to 9:00 o'clock it would have showed the cash credit of \$26.95 in this column. Do you [459] follow me?

Q. Yes.

A. So definitely it shows it was after 9:00 o'clock.

Q. That is, if you were doing it that would be the correct way to do it, is that right?

A. Yes.

Q. But you didn't do it in this case?

A. No, but whether I was doing it or someone else was bringing those bills up it would be approximately at that time of the night. I can't say that it would be definitely 9:00, but along in that period.

Q. But just to make it clear now, that is the right way to do it and that is the way you would have done it, but you didn't do it in this case?

(Testimony of George W. Hooker.)

A. That is right.

Q. And you don't know of your own knowledge whether the man who did it did it right or not, do you?

A. No, I don't.

Q. So that it is possible that if Mr. Ing checked out, let's say, 5:00, 6:00 o'clock, 7:00 o'clock on Saturday night, that this relief man, whoever he was, entered it in this way showing that it was paid through September 2 because he had paid through 2:00 o'clock on September 2?

A. You are correct. There is a possibility it could be that way. [460]

Q. That is right.

A. But it's not the normal procedure.

Q. I understand that thoroughly; it's not the normal procedure. Now, at least one thing about this ledger card shows no phone calls of any kind on September second, does it?

A. No.

Q. So if Mr. Ing was in the hotel room on September 2 he made no phone calls at least?

A. Apparently not or when he checked out. Now, normally we would call the hotel and say, "Room 40 is checking out. Any phone calls?" That is where your help sometimes falls down on us. He could have possibly had some phone calls which weren't put on there. There is that possibility.

Q. At least the record shows none?

A. Well, yes.

Q. And did not—I don't want to belabor the point, but you, yourself, did not check Mr. Ing and his wife out of the hotel?

A. No.



(Testimony of George W. Hooker.)

Q. So you do not know of your own knowledge when he checked out? A. No.

The Court: Any other cross, Mr. Hepp, Mr. Nesbett?

Mr. Nesbett: No, your Honor.

The Court: Very well. You may call your next witness then. [461]

Mr. Plummer: Let me—I may want to ask Mr.——

The Court: Just a moment, please.

Mr. Plummer: Possibly one other question.

### GEORGE W. HOOKER

testifies as follows on

### Redirect Examination

Mr. Plummer: May I approach the witness?

The Court: You may.

By Mr. Plummer:

Q. To make sure that we have this right, Mr. Hooker, what does this entry—can you see it, sir?

A. Yes.

Q. What does this entry right here mean to you?

A. Well, it means that the bill was brought up and on the morning of the second he owed \$26.95 and on the second he paid \$26.95. That is what it means to me.

Q. And it would be on the second some time that he checked out? A. Yes.

(Testimony of George W. Hooker.)

Mr. Plummer: I think I probably have no further questions.

The Court: Any recross?

Mr. Kay: A few. [462]

GEORGE W. HOOKER

testifies as follows on

Recross-Examination

By Mr. Kay:

Q. You mentioned that the phone calls would be recorded unless the help fell down. The help do occasionally fall down?

A. They do repeatedly on that.

Mr. Kay: Thank you.

Mr. Plummer: May Mr. Hooker take these with him?

The Court: Yes. May this witness be excused?

Mr. Plummer: As far as the Government is concerned he can go back to work.

The Court: Very well.

(Thereupon, the witness was excused and left the stand.)

The Court: You may call your next witness.

Mr. Plummer: Your Honor, it's about a quarter to 5:00. Are we going to quit at 5:00 o'clock?

The Court: We did want to.

Mr. Plummer: Could we quit 12 minutes early tonight?

The Court: No objection. If there isn't any ob-

jection on the part of counsel, with that in mind, could we start a little earlier in the morning?

Mr. Plummer: I would have no objection, your Honor.

The Court: I am sorry. I am not able to go to court before 10:00 o'clock tomorrow morning, therefore, we will have to continue it until 10:00 a.m. Ladies and gentlemen of the jury, [463] I must instruct you again, as you know, not to discuss this case among yourselves, nor are you permitted to let others discuss it with you and the court will stand adjourned until tomorrow morning at the hour of 10:00 a.m.

(Thereupon, at 4:50 o'clock p.m. February 25, 1958, court was adjourned to the next morning, this case to be resumed at 10:00 o'clock a.m., February 26, 1958.) [464]

The Court: Will counsel stipulate that all the jurors are present in the courtroom?

Mr. Plummer: Yes, your Honor.

Mr. Kay: So stipulated.

Mr. Nesbett: Your Honor, I have served Mr. Plummer with a motion which I want to pass up to the bench.

The Court: Very well. Very well, you may call your next witness, Mr. Plummer.

Mr. Plummer: Would you call the witness. He is right outside the door.

Mr. Nesbett: Does your Honor reserve any ruling on the motion?

The Court: Well, counsel, I can't, of course,

even do that or consider it until such time as we have had a chance to argue it. The Court hasn't even considered the motion. All I have done is read the motion and I am not in a position to reserve and/or to rule at this time until I hear counsel argue. Now you may swear the witness.

CLAUDE KENNETH BROWNFIELD,  
called as a witness for and on behalf of the Plaintiff,  
and being first duly sworn, testifies as follows on

Direct Examination

Mr. Kay: May we approach the bench prior to the [467] witness' testimony?

The Court: Yes.

(Thereupon, all counsel approached the bench, together with the Court Reporter, and the following proceedings were had out of the hearing of the jury:)

Mr. Kay: Now, I am informed that this witness is a witness by the name of Brownfield. You recall that the Court inquired at the commencement of the trial as to the witnesses which Mr. Plummer anticipated calling and other than those named on the indictment, and Mr. Plummer indicated that he could give the Court the names of no others, that—at least that he did not name, specifically did not name Brownfield. We anticipate that the testimony, or believe that the testimony of the witness Brownfield must have been known to Mr. Plummer at that time and that the reason for not naming the fact

(Testimony of Claude Kenneth Brownfield.)

that Brownfield intended to be a witness was planned to take the defense by surprise at the last possible moment just before the conclusion of the case, and for that reason, if this witness is now going to testify, we would like to have a continuance of the—even an hour at the close of the direct testimony, or reasonable continuance for a short time in order to meet the unexpected surprise of having the witness Brownfield appear, without any advice to the fact that he was to be a witness in the case although that fact must have been known at the commencement of the trial. [468]

Mr. Plummer: May I be heard?

The Court: Well, you won't object to the continuance for an hour?

Mr. Plummer: Possibly not for an hour. I will advise the Court, however, that the Court did sign an order, which I am sure is in the file and has been since Friday or—Thursday or Friday of last week. We asked for a subpoena ad testificandum and it certainly proves—the perusal of the court file will show it possibly and as far as me knowing he was going to be here, the Court will please be advised and will recall that at the start of the trial I said there is one possible witness who I did not know we'd tender to give testimony or not and told the Court that I would refer to the—delay my opening until after I knew whether or not he would be here. I didn't know until after I had made my opening, and, in fact, the matter is I didn't know whether, first, he would actually appear and testify, and,



(Testimony of Claude Kenneth Brownfield.)

second—or, first, appear, and, second, whether or not he would testify until, I would say, the latter part of last week.

The Court: Now, can you advise the Court when this witness did appear?

Mr. Plummer: The witness, I think, came in, and I don't—I would not like to be held to this date, but as I think he came in over the week end, some time last week end.

The Court: Well, those facts could be made known to counsel and court, could it not? [469]

Mr. Plummer: Oh, yes, we could call James Chenoweth and he could give the exact date. He was brought back by the penal institution by Chenoweth.

The Court: Could we ask Mr. Williamson to come to the bench a moment.

(Thereupon, United States Marshal Williamson approached the bench.)

The Court: Mr. Williamson, could you advise the Court and counsel when Mr. Brownfield was returned to Anchorage—the date—the exact date?

Mr. Williamson: He arrived on a Thursday. It must have been last Thursday.

The Court: Thank you.

Mr. Kay: May I further advise the Court Mr. T. N. Gore represents Brownfield, and, in fact, represents him on a trial in the case which is supposed to come to trial in Fairbanks next Monday. Mr. Gore yesterday, from my office, or was it the day

(Testimony of Claude Kenneth Brownfield.)

before yesterday, called Fairbanks in an effort to learn whether Mr. Brownfield had been returned to the Territory of Alaska, in accordance with the order of the Court, District Court in Fairbanks, requiring him to be returned to Fairbanks on the 15th. He learned from the jailer up there that they had not heard of Brownfield and had no idea when he was to be returned to the Territory of Alaska. Just yesterday by co-counsel, Mr. Billy Taylor, in Fairbanks, the United States Attorney up there would not reveal to [470] Mr. Taylor the whereabouts of Mr. Brownfield and whether or not he was to be returned to the Territory of Alaska, so I say if we add these things up, your Honor, it's been a deliberate attempt to take the defense completely by surprise by the appearance of Brownfield as one of the last witnesses in the case; a strategy for which I do not blame the United States Attorney, but I think the Court ought to understand it and view the position of the defense under those circumstances with a reasonable——

Mr. Plummer: I further repeat what I have already said and——

The Court: No use of repeating.

Mr. Plummer: Well, that the Court's order ordering him back here has been in the court file since the date it was issued.

Mr. Kay: Well, I don't think anybody would say—of course, I checked the day the trial commenced to see what subpoenas had been issued and none were in the file at that time.

(Testimony of Claude Kenneth Brownfield.)

The Court: Counsel, I am sure that has been in the file for considerably longer than that.

Mr. Kay: At least it was not—I didn't come across it. I don't think there would be any burden on the defense to examine it, continually examine the court file day after day when the trial commences. When did this trial commence? It was last Wednesday, your Honor, and I don't think—Mr. Plummer says Thursday. [471]

The Court: No, a week ago Thursday.

Mr. Gore: Your Honor, I'd like to be heard just a moment, temporarily, on this matter. As Mr. Kay said, I am attorney of record in the Fourth Division for Mr. Brownfield in the case set for trial next Monday morning. Last fall I attempted to require the Government to bring Mr. Brownfield back to Fairbanks for arraignment on this case. To the best of my knowledge Mr. Brownfield has never been arraigned on the charges of which he is scheduled to go to trial on next Monday morning. Now, I would like an opportunity, due to the fact that I am his attorney of record in those cases, to confer with Mr. Brownfield before he makes any statements of any kind from this witness stand and I would like Mr. Brownfield to make a statement for the record that I am no longer his attorney of record and release me of any further responsibility and liability in connection with any of the defense of any crimes of which he is accused.

The Court: Well, may I inquire, Mr. Gore. Is

(Testimony of Claude Kenneth Brownfield.)  
the testimony that will be elicited at this trial connected with the case in Fairbanks?

Mr. Gore: Yes, your Honor, it is. I think they are inseparable.

Mr. Plummer: I am sure it is not, your Honor, and I am sure Mr. Brownfield would so release Mr. Gore, probably with pleasure.

Mr. Kay: Well, you seem to know a lot more of [472] Mr. Brownfield's attitude than any of us. I don't think that remark should stand in the record. Mr. Brownfield——

Mr. Gore: I think that that is a snide remark.

Mr. Plummer: I apologize to the Court and to Mr.—I got carried away.

The Court: This petition for writ of habeas corpus ad testificandum was filed in this court on February 17.

Mr. Kay: Not served on any counsel for the defense.

The Court: Well, of course, subpoenas need not be, and also the order was signed on the same date. This file——

Mr. Kay: Subpoena or writ—petition for writ of habeas corpus, why wouldn't that have to be served on counsel?

The Court: Because of the fact that this witness is not a defendant in this case. Well, I think the record is rather clear. You have asked for an hour. The motion is granted.

Mr. Gore: Your Honor, I'd like a——

(Testimony of Claude Kenneth Brownfield.)

Mr. Plummer: That will be at the conclusion of the witness' testimony?

The Court: Well, at the conclusion of the Government's case. Isn't that what you wanted?

Mr. Gore: Yes.

The Court: Just a moment, please, Mr. Nesbett.

Mr. Gore: I want a ruling on——

The Court: Mr. Gore wants to make another statement here. Now, you may proceed. [473]

Mr. Gore: I previously made a request of the Court that I be permitted to talk to this witness prior to his giving any testimony for the reason that, in my opinion, any testimony that he gives in this case will be inseparably tied up with the charges now pending against Mr. Brownfield in the Fourth Division, and as his attorney of record in the case now pending in Fairbanks, I think it is my right and it's also my duty as attorney to talk to him prior to his making any statements in this court which might have an adverse effect on the case which is now pending in Fairbanks.

The Court: Mr. Brownfield, would you step down, please.

(Thereupon, Mr. Brownfield approached the bench.)

The Court: Mr. Brownfield, does Mr. Gore represent you?

Mr. Brownfield: Mr. Gore has represented me, but he doesn't represent me at the present time.

The Court: Very well, motion is denied then.

Mr. Gore: Then, your Honor, I would like Mr.



(Testimony of Claude Kenneth Brownfield.)

Brownfield to make a statement of record for the record here that he is releasing me from any further responsibility in connection with the criminal charges now pending against him in the Fourth Judicial Division of Alaska.

The Court: Are you prepared to make that statement?

Mr. Brownfield: Yes, sir.

The Court: Very well. Thank you.

(Thereupon, all counsel, together with the Court [474] Reporter, resumed their respective seats, and the following proceedings were had in the presence of the jury:)

The Court: You may proceed, counsel.

By Mr. Plummer:

Q. Would you please state your name, sir?

A. Claude Kenneth Brownfield.

Q. And what is your home address, sir?

A. 5900 West 107th Place, Chicago Ridge, Illinois.

Q. And how long have you lived in this location, sir?

A. Approximately a year and a half.

Q. Do you know the defendant in this case, James Burton Ing?

A. Yes, sir, I do.

Q. Can you tell me when you first became acquainted with Mr. Ing?

A. In the spring of 1956.

Q. And would you be good enough to tell the Court and jury where that acquaintanceship occurred?

(Testimony of Claude Kenneth Brownfield.)

A. This acquaintanceship occurred in Chicago.

Q. Could you be more specific? Could you name any location in Chicago where you met the defendant?

A. At the tavern where I was working at 4700 South Wentworth.

Q. And would you be good enough, sir, to tell us how you became acquainted with Mr. Ing?

A. We had several drinks together and a friend of mine introduced [475] me to him.

Q. And did you have these drinks that you mentioned? Where did you have them?

A. Oh, at the tavern where I worked and at several other taverns around Chicago.

Q. Now, how long did your association with Mr. Ing last on this occasion, sir?

A. Approximately two weeks.

Q. Now, during this two-week period did you have conversations back and forth with Mr. Ing?

A. Yes, we did.

Q. And do you recall the conversation in which the Territory of Alaska was mentioned?

A. Yes, sir, I do.

Q. And would you tell us what that conversation was?

The Court: Counsel, for the Court's sake, I'd like to have the foundation laid, time, place, and persons present, please.

Q. (By Mr. Plummer): Do you remember the time that this—or, the place where this conversation occurred?

(Testimony of Claude Kenneth Brownfield.)

A. It occurred in approximately the latter part of February or early part of March, 1956, at 4700 South Wentworth.

Q. And would you tell me the persons present?

A. Mr. Ing and myself.

Q. Yes. Now, would you tell me if—what this conversation [476] was about, the gist of the conversation?

A. We made arrangements to buy some dice and cards and several things, and also the point was brought up that how easy it was to pass checks in Alaska.

Q. And did the defendant Ing, or was there any other talk at that time and place about Alaska?

A. At that time, Mr. Ing stated that he was trying to get something lined up in the form of checks in Alaska and would I be interested in taking part in it.

Q. And what was your reply, sir?

A. I replied that I would.

Q. Now, did you subsequently have any more conversation with Mr. Ing about this matter during this association?

A. Over the period of two weeks of approximately the spring, early spring of 1956, we talked about it several times and he told me he would contact me later.

Q. And did he in fact contact you later?

A. Yes, he did.

Q. And how did he contact you?

(Testimony of Claude Kenneth Brownfield.)

A. He wrote me a letter some time in April or May, about that time.

Q. And do you have that letter in your possession, sir?      A. No, sir, I don't.

Q. What happened to the letter?

A. I destroyed the letter. [477]

Q. Would you tell us what the letter was about?

A. In this letter, he said that a friend of his would probably contact me later; that he had something in the line of checks worked out and if I was still interested to let him know.

Q. And did he give you any other instructions in that letter?

A. In this letter, he stated that it would take one or two fellows to pass checks and asked me to contact two friends in Peoria.

Q. And did you, in fact, do so?

A. Yes, sir, I did.

Q. Will you tell me what their names are?

A. Robert Hausam and Eugene Eckley.

The Court: Spell the names, please.

A. H-a-u-s-a-m and E-c-k-l-e-y.

The Court: Thank you.

Q. (By Mr. Plummer): Did you have any further contact with the defendant Ing—from the defendant Ing, that is?

A. I received one or two letters over a two or three months period of about April, May, June and July.

Q. And do you have these letters?

A. No, sir, I do not.

(Testimony of Claude Kenneth Brownfield.)

Q. Would you tell me what their contents were?

The Court: Pardon me—— [478]

Q. (By Mr. Plummer): I mean, what happened to the letters, sir?

A. I destroyed them.

Q. And why did you destroy them?

A. I was afraid to leave them around the tavern and afraid to take them home; I didn't want anyone else to see them.

Q. And will you tell me, sir, what the contents of the letters were?

A. In the majority of the letters we corresponded about the fact of passing checks in Alaska and in the last letter, Mr. Ing stated that a friend of his would contact me and give me the checks and that the three of us were to be in Alaska—in Fairbanks, rather, the last week of August, 1956.

Q. Would you tell me, if you know, why this particular time was picked?

A. This time was picked because we intended to pass checks over the Labor Day week end which would give us one extra holiday when the banks would be closed.

Q. Now, were you in fact contacted by the friend as you were advised in the letter that you would be?

A. Yes, sir; a fellow that I did not know brought a box to the tavern just before I left Chicago, in the latter week of August.

Q. And did you open the box?

A. Yes, sir, I did.



(Testimony of Claude Kenneth Brownfield.)

Q. And would you be good enough to tell us what the box contained? [479]

A. This box contained a check protector, two birth certificates, and approximately four hundred checks that appeared to be Morrison-Knudsen payroll checks.

Q. Now, did you, Mr. Eckley and Mr. Hausam come to Alaska as instructed?

A. Yes, sir, we did.

Q. Did you bring the checks with you?

A. Yes, sir, I did.

Q. Now, do you know what kind of checks these were, sir?

A. As I said, they appeared to be Morrison-Knudsen payroll checks. They were drawn on the First National Bank of Anchorage and Morrison-Knudsen's home office was listed as Boise, Idaho. These checks were signed with the name Guy King—I don't remember exactly if it was G. M. King, or Guy King, but the rest of the check was blank.

Q. Did you in fact, the three of you then proceed on to Alaska as contemplated?

A. Yes, sir, we did.

Q. And where did you arrive?

A. We arrived at the airport in Fairbanks.

Q. And what happened, if anything, when you arrived at the airport in Fairbanks?

A. We went from the airport to the Fairbanks Country Club.

Q. And what did you do with the checks in the

(Testimony of Claude Kenneth Brownfield.)

suitcase containing the checks, if you know? [480]

A. I gave the checks and the suitcase to Mr. Ing.

Q. Out at the Country Club? A. Yes, sir.

Q. Now, did you see Mr. Ing—first, would you tell us what day you arrived in Fairbanks, if you know, sir?

A. I am not positive, but I am reasonably sure it was August 27th.

Q. And about what time of the day, if you recall? A. Early in the morning.

Q. And did you have a conversation with Mr. Ing the following day? A. Yes, sir, I did.

Q. And would you tell me where this conversation occurred?

A. This conversation was between Mr. Ing and myself at the country club in Fairbanks.

Q. And you recall about what time of the day it was? A. I believe it was in the afternoon.

Q. And would you be good enough, sir, to tell me what the conversation was about?

A. The conversation was about the proposed deal of passing these checks.

Q. And can you recall anything else about the conversation at that time, sir?

A. During this time, I could not understand how three people could pass so many checks in Fairbanks, and I asked about [481] this.

Q. And what was Mr. Ing's response when you asked him, sir?

A. He replied that he had arranged people that

(Testimony of Claude Kenneth Brownfield.)

I did not know and was going to have them pass checks in Anchorage.

Q. And did he indicate the time that the passing in Anchorage was going to take place, sir?

A. The time was to be the same time that I was passing checks in Fairbanks, the Labor Day week end.

Q. And was anything said about the termination of the operation, when it was supposed to end?

A. I was to stop passing checks at 9:00 o'clock Labor Day evening and at that time, was to catch a plane back to Seattle and he informed me that everybody would stop passing checks at approximately that time and catch planes out of Alaska.

Q. Now, during the course of the conversation on that occasion, did Mr. Ing make any remarks about the checks that you brought up and were going to pass?

A. At that time, he showed me what he said was a genuine Morrison-Knudsen check and pointed out that they were very similar, that the main difference was that the Morrison-Knudsen payroll checks were watermarked with an "M-K" and the other checks were merely watermarked on safety paper.

Q. Now, these checks that you turned over to Mr. Ing, were they completed as to the name of the payee and the amounts of the check and checks and so on? [482]

A. No, sir, they were not.

Q. And would you tell me who, if you know, completed these checks? A. I——

(Testimony of Claude Kenneth Brownfield.)

Q. (Continuing): —the names of the payee and the amounts?

A. I completed a great number of them, typing the names and the amount of the check and Mr. Ing did part of them and the two of us run them through the check protector.

Q. And where did this operation occur, sir?

A. In the trailer that was parked behind the Fairbanks Country Club.

Mr. Plummer: May these be marked for identification? May the record reflect that I am now showing Plaintiff's Exhibits for identification only 26 and 27 to counsel?

The Court: Very well, without objection.

(Thereupon, the documents were handed to defense counsel.)

Mr. Plummer: May I approach the witness, your Honor?

The Court: You may.

Q. (By Mr. Plummer): Sir, I hand you what has been marked for identification only as Plaintiff's Exhibit 26 and Plaintiff's Exhibit 27 and ask you to tell me what they are, if you know?

A. Those are the two birth certificates that I brought from Chicago.

Q. And where did you originally get them? [483]

A. They were given to me with the checks and the check protector before I left for Alaska.

Q. In the box that was delivered at the tavern?

A. Yes, sir.

(Testimony of Claude Kenneth Brownfield.)

Mr. Plummer: May I approach the witness?

The Court: You may.

Mr. Plummer: I offer these in evidence at this time.

The Court: Is there objection?

Mr. Gore: Object to them, your Honor, as being no relevancy shown between the birth certificates and the testimony of this witness in connection with the commission of any offense here in Anchorage, and, certainly, they are in no way connected up with any of the defendants now on trial, but purport to be birth certificates of a person named Peter Thompson and some other person and there is no way of showing that they are in any way connected with the defendants on trial.

Mr. Plummer: I don't believe Mr. Gore is listening to the testimony, otherwise he would have heard this witness testify that the defendant Ing arranged for a person to come and leave a box at his place, the box contained the checks, the check protector, and these two birth certificates. Certainly——

Mr. Kay: What does that have to do with the issue before this court on this trial?

The Court: Objection overruled. It may be marked Government's Exhibits Nos. 26 and 27.

Q. (By Mr. Plummer): Now, in addition to the birth certificates which have just been admitted, did you have any other identification or was any other identification furnished to you by the defendant Ing subsequent to your arrival in Fairbanks?



(Testimony of Claude Kenneth Brownfield.)

Mr. Kay: Object as leading.

Mr. Plummer: I am sorry.

Q. (By Mr. Plummer): Did you have any other identification other than the birth certificates?

A. Yes, sir, I did.

Q. And would you be good enough to tell me what they were?

A. I had several of the small isinglass forms that are taken from billfolds and filled these out and signed them under the name of Charles Lappa. I had two drivers licenses that were made in the name of Charles Lappa and I had one identification card that I used and which I pasted a small picture of myself on this.

Q. Where did you obtain this picture?

A. Mr. Ing took this picture of me at the country club.

Mr. Plummer: Would you mark these for identification?

Deputy Clerk: All as one?

Mr. Plummer: I think probably separately.

The Court: Just a moment, please. It may be marked 28, 29 and 30. [485]

Mr. Kay: I believe it starts with 29.

The Court: As I understood, 26 and 27 were the other two.

Mr. Kay: I thought it was 27 and 28. I am sorry.

Q. (By Mr. Plummer): Would you be good enough to tell us, sir, while we are waiting, where you obtained this identification?

A. From Mr. Ing.

(Testimony of Claude Kenneth Brownfield.)

Mr. Nesbett: What did he say?

The Court: "From Mr. Ing."

Mr. Plummer: May the record reflect that I'm now showing 28, 29 and 30 for identification to counsel?

(Thereupon, the documents were handed to defense counsel and thereafter returned to Mr. Plummer.)

Mr. Plummer: May I ask leave of the Court to approach the witness?

The Court: You may.

Q. (By Mr. Plummer): I hand you, sir, what's been marked for identification only as Plaintiff's Exhibits 28, 29 and 30 and ask you if you will be good enough to tell me what they are, if you know?

A. This is the identification that was given to me by Mr. Ing and this is the picture that he took of me.

The Court: Now, are you referring to—which one?

A. Number 30. [486]

Mr. Plummer: I offer Number 30 in evidence, your Honor.

The Court: Is there objection? (Pause.) It may be admitted and marked Plaintiff's Exhibit No. 30.

A. No. 28 is a driver's license that was given me by Mr. Ing.

Mr. Plummer: May I approach the witness?

The Court: You may.

Mr. Plummer: I offer No. 28 in evidence.

(Testimony of Claude Kenneth Brownfield.)

The Court: Is there objection?

Mr. Kay: No objection.

The Court: Hearing none, it may be admitted and marked Government's Exhibit No. 28.

Q. (By Mr. Plummer): And would you look at the other object there?

A. No. 29 was not given to me by Mr. Ing.

Q. Very good, sir.

The Court: What is it?

Q. (By Mr. Plummer): Would you tell me what it is?

A. It's a card that denotes membership in the Fairbanks Golf and Country Club.

Q. Do you know where you obtained that?

A. Yes, sir, that was sent to me by a friend from Fairbanks. It was more or less just a souvenir.

The Court: Before or after the incident in question?

A. Quite some time before. [487]

The Court: Thank you.

Q. (By Mr. Plummer): Now, was it your testimony, sir, that Mr. Ing took the picture with the camera which is now pasted on Plaintiff's Exhibit No. 30, the driver's license? A. Yes.

Mr. Kay: Repetitious.

The Court: Objection sustained.

Mr. Plummer: It's just, your Honor—it's preliminary.

The Court: Well, excepting this, that it's repetitious as Mr. Kay has pointed out. You may proceed.

Q. (By Mr. Plummer): Were any other pic-

(Testimony of Claude Kenneth Brownfield.)

tures taken of any other individuals at that time by Mr. Ing?

A. Yes, sir, at that time he took pictures of Robert Hausam and Eugene Eckley.

Mr. Kay: Object to that and ask that it be stricken; has no relevance to connect any issues in this case. It relates entirely to evidence concerning a separate incident in the City of Fairbanks.

The Court: Objection overruled. It may stand. You may proceed.

Q. (By Mr. Plummer): Now, Mr. Brownfield, will you tell me, if you know, who purchased the tickets from—for the transportation of you [488] three from Chicago to Fairbanks? A. I did.

Q. And do you recall about how much it cost?

A. A little over \$500.00.

Q. And were you ever reimbursed for this expenditure? A. Yes, sir, I was.

Q. And by whom? A. Mr. Ing.

Q. And would you tell me when and where this occurred?

A. The day after we arrived in Fairbanks Mr. Ing gave me fifty \$10.00 bills at the Fairbanks Country Club. At that time he stated that this would take care of the transportation, the money that we had used up for our transportation.

Q. Now, did you have an agreement with anybody about passing the checks?

A. Yes, sir, I did.

Q. With whom? A. Mr. Ing.

(Testimony of Claude Kenneth Brownfield.)

Q. And would you tell us what that agreement was?

A. I was to keep half of the money that I received from cashing the checks.

Q. And what was supposed to happen to the other half? A. It was to go to Mr. Ing.

Q. Now, Mr. Brownfield, have you even been convicted of a crime?

A. Yes, sir, I have. [489]

Q. Would you tell us what crimes and——

Mr. Kay: This has been done before, but I object to the United States Attorney impeaching his own witness.

Mr. Plummer: I am not impeaching.

Mr. Kay: Yes, your Honor, proof of the commission of a crime is only to show impeachment of a witness. Now, it's the right, prerogative of the defense to impeach the witness, not the United States Attorney, and I object to it.

The Court: The objection is made. The objection will have to be sustained, Mr. Plummer.

Mr. Plummer: Very well. May I have just a moment, your Honor?

The Court: You may.

Mr. Plummer: May I approach the witness?

The Court: You may.

Q. (By Mr. Plummer): Mr. Brownfield, I'll ask you to look at these exhibits which are Plaintiff's Exhibits 1 through 19 and 21 and tell me if these are the checks that you brought from Chicago?

A. May I take it out of the cellophane wrapper?



(Testimony of Claude Kenneth Brownfield.)

Q. Yes, sir.

The Court: Can you help the witness, Mr. Plummer?

A. I don't need to take it out; I'm sorry. This (indicating) is one of the checks that I brought to Alaska.

The Court: That you—what are you referring to when [490] you say "this"? Look on the front, please.

A. I believe this is Exhibit No. 1.

Q. (By Mr. Plummer): Yes, sir, and would you hastily glance through the others and see if that is true with the others?

A. Exhibit No. 2 is one of the checks that I brought to Alaska.

Q. And would you run through the balance of the checks that you have there in front of you, sir?

A. I am sure that I brought all those (indicating) checks to Alaska.

Q. Thank you.

Mr. Plummer: Your Honor, may I approach the witness?

The Court: You may.

Q. (By Mr. Plummer): And what did you do with them after you brought them to Alaska?

A. After I brought them to Alaska, I turned them over to James Ing.

Mr. Plummer: I have no further questions, your Honor.

The Court: You may cross-examine then.

Mr. Kay: Your Honor, we'd like to take at least

(Testimony of Claude Kenneth Brownfield.)

a portion of the time which was accorded to us at the bench prior to cross-examination of this witness. As we said then, it takes us by surprise and we want an opportunity to confer before——

The Court: Well, supposing we did this then—I, [491] of course, don't want to delay the trial any longer, but suppose we recess now until 2:00 p.m. That would give you all the time that you desire. Any objection, Mr. Plummer?

Mr. Plummer: No, it will be all right, your Honor. We are wasting a half hour and we were late getting started and we are wasting a half hour now. I don't see why they can't cross-examine him until noon and confer and resume their cross-examination this afternoon.

Mr. Kay: I don't see why Mr. Plummer couldn't have informed us that Mr. Brownfield was going to be a witness and we would have had an opportunity to examine him. I don't think a half hour in the course of testimony is a waste of time, your Honor, although Mr. Plummer may feel so.

The Court: Well——

Mr. Plummer: May I through the Court, advise Mr. Kay that there has been notice since the last week in the court's record that Mr. Brownfield might be a possible witness. If he had taken the trouble to look at the court record——

The Court: Well, let's not go any longer. We are not accomplishing anything thereby. For the reasons stated by the defense, ladies and gentlemen of the jury, the trial of this case will be continued

(Testimony of Claude Kenneth Brownfield.)

until 2:00 p.m. this afternoon. For information purposes only, how many more witnesses do you intend to call, Mr. Plummer? No movement in the courtroom, please.

Mr. Plummer: I may not call any more or I may call [492] one or possibly two. They will be short witnesses, if called.

The Court: I see. That is so that counsel will have notice for the defense as to when they might go to trial in their case.

Mr. Plummer: I would say that possibly not over a half an hour after they have completed their cross-examination and I have completed by recross or my rebuttal examination, or whatever is the proper name, that my—redirect examination, that the Government will rest its case.

The Court: Very well. Ladies and gentlemen of the jury, then, I must instruct you not to discuss this case among yourselves nor are you permitted to let others discuss it with you, as you have heretofore been instructed.

The trial of this case will be continued until 2:00 p.m., but this court will go into recess until 1:30.

(Whereupon, at 11:25 o'clock a.m., the court continued the cause to 2:00 p.m. of the same day.)

(At 2:00 o'clock p.m., all counsel and defendants being present, the trial of said cause was resumed:)

The Court: Will counsel stipulate that all the jurors are back and present in the box?

(Testimony of Claude Kenneth Brownfield.)

Mr. Kay: Yes, your Honor.

Mr. Plummer: Yes, your Honor. [493]

Mr. Gore: Yes, your Honor.

The Court: Thank you. Very well, you may cross-examine.

CLAUDE KENNETH BROWNFIELD  
testifies as follows on

Cross-Examination

By Mr. Gore:

Q. Mr. Brownfield, you testified this morning that you first met Mr. Ing in a bar in the City of Chicago, did you not? A. Yes, sir.

Mr. Plummer: I object to the form of the question. He should say "did you."

The Court: Yes. Objection sustained.

Q. (By Mr. Gore): Mr. Brownfield, did you testify this morning that you first met Mr. Ing in a bar in the City of Chicago, Illinois?

A. Yes, sir, I did.

Q. Can you give me the approximate date on which you first met Mr. Ing?

A. That was in February or March, I believe, of 1956.

Q. Do you remember the name and the address of the bar?

A. Fuller Park Tavern, 4700 South Wentworth.

Q. What was your employment at the time?

A. I worked at this bar. [494]

Q. How long had you been working there?

(Testimony of Claude Kenneth Brownfield.)

A. Approximately two years.

Q. And who was the owner of the bar?

A. Joseph Janas.

Q. And how do you spell that last name?

A. J-a-n-a-s.

Q. Is he the person commonly known and referred to as Uncle Joe?

A. Not to my knowledge, no.

Q. Will you state the circumstances under which you first met Mr. Ing?

A. I believe he was at the tavern drinking.

Q. And how did the conversation between you and Mr. Ing come up?

A. I believe he was introduced to me by a friend of mine.

Q. And who was that friend?

A. Frank Padotey.

Q. How long had you known Mr. Padotey?

A. Seven or eight years.

Q. At that time, as a matter of fact, you were working for Mr. Padotey, were you not?

A. I was working for Mr. Janas.

Q. Did Mr. Padotey have any interest in the bar in which you were working?

A. Not to my knowledge.

Q. Did Mr. Padotey hang around that bar very much?

A. Mr. Padotey and I were friends and I saw him quite often. [495]

Q. When did you first meet Mr. Padotey?

A. I would say about 1948.



(Testimony of Claude Kenneth Brownfield.)

Q. Under what circumstances did you meet Mr. Padotey?

Mr. Plummer: I object to the question. It's completely outside the scope of the direct examination and has no material bearing in the issue in this case.

The Court: What is the materiality, Mr. Gore?

Mr. Gore: Your Honor, it's—if the counsel for the Government wishes me to state——

Mr. Plummer: Let's approach the bench if it's anything that is going to be prejudicial. May we approach the bench, your Honor?

The Court: Yes, you may.

(Thereupon, all counsel approached the bench, together with the Court Reporter, and the following proceedings were had out of the hearing of the jury:)

Mr. Gore: This examination is directed to obtain from the witness statements to the effect that he first met Padotey when they were cell mates in the prison of the State of Illinois and that that association continued for quite a long period of time and that after he was released from the penitentiary he was employed by Mr. Padotey and that Mr. Padotey subsequent to—in the early part of 1956 came to Fairbanks, Alaska, with a person by the name of John Volk, who was also a prisoner in the [496] penitentiary at the same time, and that Mr. Padotey then became engaged in business with Mr. Ing at the Fairbanks Golf and Country Club.

Mr. Plummer: Your Honor, may I be heard?

(Testimony of Claude Kenneth Brownfield.)

Mr. Kay: Well, I wanted to supplement that by saying that it is going to be, and I think we might as well say so, under the theory of the defense, that Frank Padotey had a very large and unknown interest in this transaction and that the witness Brownfield—we should be allowed to interrogate the witness Brownfield concerning his relationship with the man Padotey and the relationship, if any, in which Padotey had in this nature.

The Court: Well, I will concede if by chance you connect it up with the case, but so far it has no relevancy to the case.

Mr. Kay: That is the point. We have got a perfect right to—there, naturally, would not be any if we had nothing but Government witnesses, but we have a right to examine this man.

The Court: That is true, on relevant facts and material facts.

Mr. Kay: Right, and that is exceedingly relevant to the theory of the defense. If—the theory of the defense is the connection here was with Padotey and not with him, that is certainly vital and material and should not be limited on cross-examination of this witness. [497]

Mr. Gore: He has testified, your Honor, that he was introduced by a friend and this friend was Padotey and I think then, we are entitled to establish the relationship between this friend who made the so-called original introduction, especially when we can connect it up; that that friend later became

(Testimony of Claude Kenneth Brownfield.)

a partner in the very business which Mr. Ing was engaged.

The Court: But, counsel, supposing that this Padotey had a thousand other businesses, what is the materiality in this case? And supposing that Ing and Padotey had inter-relationship in other businesses, what is the materiality in that case? Padotey is now not charged.

Mr. Kay: Not by the Government, but we don't know what the relationship is, but we believe we have a perfect right to show that it may very well be that Padotey is the man who had this connection with this defendant over these very checks.

The Court: Of course, that is a question of fact for the jury.

Mr. Kay: I know, and that is why we have the right to cross-examine him about it and we intend to call other witnesses.

Mr. Plummer: Before you go, may I be heard?

Mr. Nesbett: I'd like to be heard too.

The Court: Just a moment. Mr. Gore, do you have something else?

Mr. Gore: He has testified, your Honor, as to his reasons for coming to Fairbanks and persons who actually brought [498] him there and I think we are entitled to go into that purpose, to make the showing, if we can, as to a different person who actually introduced or influenced his trip to Fairbanks.

The Court: Well, wouldn't you be entitled to maybe call him as an adverse witness?

(Testimony of Claude Kenneth Brownfield.)

Mr. Kay: Why should we have to, your Honor?

The Court: That's—I am talking to Mr. Gore.

Mr. Gore: Your Honor, he's on the stand now for the purpose of cross-examination relative to his participation and the whole theory of the Government's case—they went right into his reasons for coming to Alaska and his acquaintances and I certainly think we should be entitled to cross-examine him on that line. I realize that if we chose, after we put on witnesses, we could recall him as an adverse witness, but I certainly think the proper time to do it is on cross-examination.

The Court: Mr. Nesbett, do you want to be heard?

Mr. Nesbett: I was just going to point out, your Honor, that the Government is—the jury is going to be asked to find a conspiracy here and, certainly, all evidence showing how Brownfield happened to be connected with the case, even though it may be going back a number of years, would be relevant.

The Court: Is it your theory that this indictment is under conspiracy?

Mr. Kay: No. The theory of the Government has been, however, that it was a concerted scheme to cash each one of [499] these checks and now they have brought in four hundred checks transported from Chicago by this witness, part of which were passed in Fairbanks and a part of which were passed in Anchorage—part of which were passed in Fairbanks by this very witness and the man he's now admitted that Padotey is the man that intro-

(Testimony of Claude Kenneth Brownfield.)

duced them. Padotey had the Country Club. The evidence will show that Padotey left two days after this offense was committed and hasn't been seen since and we have every right to examine this man fully with his connection of the witness Padotey.

The Court: Mr. Hepp, do you wish to be heard?

Mr. Hepp: No, I have nothing to say that hasn't been said.

The Court: Mr. Plummer.

Mr. Plummer: Yes, your Honor, I have no objection to their interrogating this witness about his association or his knowledge of the fellow Padotey so long as it's material. I do not believe it is material, but if they are going to do it, they should do so properly and there is not a counsel standing at this table who know what Mr. Gore was going to do is improper. It is set out in the statute you cannot ask humiliating or improper questions. The only thing you can do is ask if he has been convicted of a crime and you know you can't ask him, especially if you know in advance that—bring out the fact that they met in prison. That is very, very improper.

Mr. Kay: Under the statute you can impeach a witness, [500] certainly, by conviction of a crime, but do you mean to say that it's improper to—if a witness met a material person in the penitentiary that just simply because he met him in a penitentiary you can't ask him about it?

Mr. Plummer: There is no indication that Mr. Padotey is a material person. He's certainly not



(Testimony of Claude Kenneth Brownfield.)

been mentioned to date in the testimony except——

Mr. Kay: Carefully not mentioned by the Government, of course.

Mr. Plummer: If it became a material witness in your presentation of the case, so that it is material, then I suggest you recall the witness Brownfield and interrogate him at that time.

The Court: Objection sustained at this time.

Mr. Kay: You mean to this particular question?

The Court: Yes.

(Thereupon, all counsel and the Court Reporter resumed their respective seats, and the following proceedings were had in the presence of the jury:)

Q. (By Mr. Gore): You stated you met Mr. Padotey in 1948, did you not? A. Yes, sir.

Q. Do you know a gentleman by the name of John Volk? A. Yes, sir, I do.

Q. How long have you known Mr. Volk? [501]

A. Since about 1949.

The Court: How do you spell that name, Mr. Brownfield?

A. V-o-l-k.

The Court: Thank you.

Q. (By Mr. Gore): Did you have occasion to see either Mr. Padotey or Mr. Volk after your arrival in Fairbanks in the latter part of August, 1956?

A. I did see Mr. Padotey, but I don't recall if I saw Mr. Volk or not.

(Testimony of Claude Kenneth Brownfield.)

Q. What was Mr. Padotey's occupation at the time you saw him in August, 1956?

A. He was working for Mr. Ing.

Q. Do you know the nature of that relationship, was it as a partner or as an employee?

A. I am not positive.

Q. Do you know a gentleman by the name of John Scott?

A. I think I met him, yes.

Q. Did you see very much of either Mr. Volk or Mr. Padotey after your arrival in Fairbanks?

A. I saw Mr. Padotey several times at the Country Club.

Q. Do you know what, if any, connection Mr. Volk had with this general check passing scheme?

A. No, sir, I don't.

Q. Did you get to know Mr. Volk pretty well during your [502] acquaintanceship with him from 1949 to 1956?

A. I don't know what you mean by "very well." Could you explain what you mean?

Q. Were you fairly close friends?

A. No, I would say we were not fairly close friends.

Q. Were you thrown into rather close contact with him during that period of time?

A. No, sir.

Q. Now, assuming that it had been previously brought out during the course of this trial that Mr. Volk was one of the persons who cashed the checks here in Anchorage during this Labor Day week end——

(Testimony of Claude Kenneth Brownfield.)

Mr. Plummer: I object to the question. He can't assume any fact not in evidence and there has been no evidence whatsoever of any checks that may or may not have been cashed by Mr. Volk.

The Court: Objection sustained.

Mr. Kay: May I be heard on that?

The Court: Well, as I recall, there was no—there isn't any evidence before the Court that Mr. Volk cashed the checks here in Anchorage.

Mr. Kay: There isn't? Then the Court has evidently or maybe I have forgotten the testimony of Officer Dankworth, or whatever he was, here yesterday afternoon in regard to—

The Court: Well, if I am not mistaken, Mr. Kay, wasn't [503] that reference another problem?

Mr. Kay: No, unless I am mistaken Dankworth testified that Smith told him that Volk had passed a number of checks in town together, throughout the trip. Am I wrong or not?

Mr. Plummer: I believe that is right. He testified as to the admissions made by the defendant Smith to him on the 17th day of March and I stand in error, your Honor, but—

The Court: The Court thought that was at Fairbanks, not at Anchorage.

Mr. Kay: Oh, no, that was in Anchorage, to my recollection.

Mr. Plummer: I still object to the question. You can't put the question to this witness "assume this and assume that."

The Court: Well, but he can assume a fact in

(Testimony of Claude Kenneth Brownfield.)  
evidence and it's on cross-examination. Objection  
overruled then. The Court apparently was in error.

Mr. Plummer: I apologize for mis-stating the  
evidence.

The Court: Very well. You may proceed, Mr.  
Gore.

Mr. Gore: Would the Court Reporter read that  
part of the question?

(Thereupon, the Court Reporter read ques-  
tion line 9, page 503.)

Q. (By Mr. Gore): Would that bring to mind  
any closer relationship between [504] yourself and  
Mr. Volk than that to which you have testified?

A. No, sir, it wouldn't.

Q. Did you have any conversation with John  
Volk relative to this general check passing scheme?

A. No, sir, I didn't.

Q. Did you have any conversation with Mr.  
Padotey relative to this check passing scheme?

A. No, sir.

Mr. Gore: May I approach the witness, your  
Honor?

The Court: You may.

Q. (By Mr. Gore): Mr. Brownfield, I will hand  
you Plaintiff's Exhibit 28, which is a motor vehicle  
operator's license for the Territory of Alaska, bear-  
ing serial number 21339, and ask you whether or  
not that was not a driver's license which was issued  
to Mr. Frank Padotey?

A. That driver's license was given to me by Mr.  
Ing and at the time it was blank, the top line.

(Testimony of Claude Kenneth Brownfield.)

Q. Mr. Brownfield, do you remember any conversation that you had with members of the Alaska Territorial Police at which time it was stated to you that that license was Mr.—was originally issued to Mr. Frank Padotey? A. No, sir.

Mr. Plummer: I object to the question; improper foundation and he must show the date, time, and persons present. [505]

The Court: Objection sustained. You may rephrase your question.

Q. (By Mr. Gore): Mr. Brownfield, when were you first arrested in connection with your part of this check passing scheme?

A. In the early part of September, 1956.

Q. Do you remember the time of day?

A. I think it was about 3:00 in the afternoon.

Q. Do you remember the place at which you were arrested?

A. I believe I was arrested on one of the streets at Fairbanks.

Q. Were you in any establishment at the time you were arrested? A. No, sir.

Q. Were you placed in jail immediately after your arrest?

A. I was taken to Territorial Police headquarters.

Q. At that time did you make any statement to the Territorial Police or any law enforcement officer relative to your name, address, and occupation?

A. At that time I refused to give my name, my address, or anything about myself.



(Testimony of Claude Kenneth Brownfield.)

The Court: Pardon me, please, Mr. Gore. Mr. Williamson, may I ask one of your officers to stand near the door, please. Thank you. I am sorry, Mr. Gore. You may now proceed.

Q. (By Mr. Gore): During the days and weeks which followed your arrest in Fairbanks, and the placing of charges against you, were you [506] interrogated on various occasions by law enforcement officers in Fairbanks?

A. I don't recall that I was.

Q. You don't recall any sessions which you had with them at which time they endeavored to question you relative to your participation in this scheme?

A. They endeavored to question me on the first day that I was arrested at the Territorial Police Headquarters.

Q. And what was your answer to them at that time?

A. I would not sign any statement and did not give any testimony.

Q. At the time were you questioned relative to the connection, if any, of James Ing with this transaction?

The Court: Pardon me, please. The courtroom is getting too crowded. The Court will have to ask all of those in the back of the room to either sit down or absent yourself from the courtroom. I am sorry, Mr. Gore. Now, you may proceed.

Mr. Gore: I have asked the question. Will the Reporter read it back.

(Testimony of Claude Kenneth Brownfield.)

(Thereupon, the Court Reporter read question line 12 above.)

A. No, sir, I was not.

Q. (By Mr. Gore): It's your statement then that you were never questioned relative to the connection of Mr. Ing with this transaction up until the present time? [507]

A. I don't recall that I was, no, sir.

Q. Do you recall a conversation which you had with Mr. Harkabus and Lt. William Trafton of the Territorial Police, when they on occasion visited you at the penitentiary, McNeil Island, Washington, to question you relative to Mr. Ing's participation in this offense, in the early part of the year 1957?

A. I do not recall that Mr. Ing's name was mentioned.

Q. Mr. Brownfield, you are presently under indictment in the Fourth Judicial Division of Alaska, Fairbanks, on several charges of——

Mr. Plummer: I object to the question. It's improper to ask him whether or not he's under indictment.

The Court: Objection sustained.

Mr. Kay: Oh, your Honor, may I be heard on that?

The Court: Yes, you may.

Mr. Kay: Well, certainly, the motive or the interest of the witness——

(Testimony of Claude Kenneth Brownfield.)

The Court: But not on this count though, this charge, is it?

Mr. Kay: Well, if he is under indictment by the United States, it's the same United States in Fairbanks as it is in Anchorage, and if he's under indictment by the United States Government at this time it's certainly proper to show it on this witness stand, your Honor. It would be highly prejudicial to deny the right to question this witness concerning any possible [508] motive he may have and that is one of the strongest motives. If he was under indictment here it certainly would be proper. It's no different, the fact that he's under indictment in Fairbanks.

The Court: But does it concern, Mr. Kay, a similar problem to this?

Mr. Kay: Well, it concerns his credibility here.

The Court: Just answer the question. I have asked you a question.

Mr. Kay: Does it concern a similar problem here?

The Court: Yes, the indictment?

Mr. Kay: Mr. Gore knows what the indictment is. No, I do not know.

The Court: Well, just say so. Thank you.

Mr. Plummer: We can possibly approach the bench and Mr. Gore can advise the Court.

The Court: Very well.

(Thereupon, all counsel approached the bench, together with the Court Reporter, and

(Testimony of Claude Kenneth Brownfield.)

the following proceedings were had out of the hearing of the jury:)

Mr. Gore: Your Honor, it's been brought to my attention that in the case which has been set on for trial next Monday in Fairbanks, that an agreement has been reached between this witness and the United States Government under which a plea of guilty will be entered to certain charges, or certain counts of that [509] pending indictment, and that a charge under which this defendant is charged as being a habitual criminal will be brought and I certainly think that we are entitled to inquire into the interest of the witness in the present case. I think I could connect that up, but, certainly, I think it's material to the cross-examination.

The Court: Well, I don't understand counsel for the defense's position. Why didn't you bring out the fact that he has been convicted of a crime? Why are you still about that? Give the Court some foundation.

Mr. Kay: Ask him then; start off with all his convictions and work up to this indictment?

The Court: Surely the Court is entitled to be informed.

Mr. Gore: I frankly see no connection between the two, one going to credibility and one going to the interest of the witness. I think they are two entirely different theories of cross-examination.

The Court: Of course, the Court is the first to concede that; on the other hand, the Court is entitled to know and for the Court's information, so

(Testimony of Claude Kenneth Brownfield.)

the Court can anticipate, I think that in conformance with good practice that would be the better way.

Mr. Gore: Yes, your Honor.

Mr. Plummer: May I suggest to counsel if he wants to elicit information as to whether or not this witness has been [510] promised anything by the United States Government, that he should ask him.

Mr. Kay: That is what we are going to do, intend to ask him.

Mr. Gore: I think it's prerequisite to making any offerings such as requested by the United States Attorney. I would have to lay the foundation by showing the charges are presently pending against him.

The Court: Not only have to, but you'd be entitled to on that basis then. Well, for the reasons stated then, I think you'd have no objection to going in conformance with standard accepted practice to determine whether or not he has ever been convicted of a crime and then proceed to the next point.

(Thereupon, all counsel, together with the Court Reporter, resumed their respective seats, and the following proceedings were had in the presence of the jury:)

Q. (By Mr. Gore): How old are you, Mr. Brownfield?      A. 38.

Q. Have you ever been convicted of a crime?

A. Yes, sir, I have.

Q. Have you ever been convicted of more than



(Testimony of Claude Kenneth Brownfield.)

one crime?           A. Yes, sir, I have.

Q. Would you state what those crimes were, where they were, in [511] chronological order?

A. Larceny in Champaign, Illinois, 1938; manslaughter in Charleston, Illinois, 1946; passing of forged checks in Fairbanks, Alaska, in December of 1956.

Q. And as a result of your convictions of those crimes, were you sentenced to confinement in any state penitentiary?           A. Yes, sir, I was.

Q. Would you state the name of the penitentiary and the years which you spent in those penitentiaries?

Mr. Plummer: I object to the question. I don't think the witness should answer.

The Court: Objection sustained.

Q. (By Mr. Gore): Are you presently under indictment?           A. Yes, sir.

Q. And where is that indictment pending?

A. Fairbanks, Alaska.

Q. What is the nature of the charges pending against you in that indictment?

A. Four counts of having a forged check in my possession and one count under the habitual criminal act of Alaska.

Q. Do you know, Mr. Brownfield, when the charges pending under that indictment have been set for trial?

A. I'm not positive. All I know is what you wrote me.

Q. Well, were you informed in that letter that

(Testimony of Claude Kenneth Brownfield.)

the cases were [512] set for trial on March 3, 1958, which is next Monday?      A. Yes, sir.

Q. When were you first approached by a representative of the United States Government relative to testifying in connection with this trial?

Mr. Plummer: I object to the question; assuming a fact not in evidence.

Mr. Gore: I think the appearance on the witness stand of this defendant would certainly be a fact from which it could be assumed that this witness was approached.

The Court: Of course, that is true, but there's nothing before the Court in that respect, therefore, the Court will have to sustain the objection. You may rephrase your question, Mr. Gore.

Q. (By Mr. Gore): Mr. Brownfield, were you approached by any representative of the United States of America relative to testifying in connection with this present case?      A. Yes, sir.

Q. Would you state when that was?

A. Approximately a week ago.

Q. And assuming that—today is Wednesday. Would you say that you were approached last Wednesday on the matter?

The Court: For your information, last Wednesday was the 19th day of February.

A. I'm not positive if it was Tuesday or Wednesday. [513]

Q. (By Mr. Gore): By whom were you approached?      A. Deputy Marshal Chenoweth.

Q. And he is a deputy marshal from where?

(Testimony of Claude Kenneth Brownfield.)

A. Anchorage.

Q. And did he visit with you in the United States penitentiary at McNeil Island, Washington?

A. Yes, sir.

Q. Did he come there as a result of any previous contact with you?

A. No, he had not had any contact with me.

Q. Had you had any previous contact or correspondence with the United States Attorney's office either here or in Fairbanks relative to your testimony in this case?

A. I had written a letter to Mr. Yeager in Fairbanks.

Q. And did that letter contain any offer to testify on your part in exchange for any requested or recommended leniency on his part in connection with the now pending case in Fairbanks?

A. No, sir, it did not.

Q. Would you state the general content of that letter?

Mr. Plummer: I object.

Q. (Continuing): —insofar as it affects the case now on trial?

Mr. Plummer: I object. The question as stated has already been answered, and for the further objection that he [514] can't testify to the contents of the letter unless counsel shows it's not available to him after making an inquiry in attempting to do so.

The Court: Mr. Gore, I think you better lay the foundation first.

(Testimony of Claude Kenneth Brownfield.)

Q. (By Mr. Gore): Mr. Brownfield, do you have a copy of that letter?

A. Not with me, no.

Q. Did you retain a copy of it?

A. Yes, sir.

Q. And where is that copy?

A. McNeil Island.

Q. Is it available to you this afternoon for use during the course of this trial?

A. It's at McNeil Island.

Q. Then it is unavailable for use this afternoon in connection with this case?

A. It's unavailable as far as I am concerned, yes, sir.

Q. Now, would you state the content of that letter insofar as——

Mr. Plummer: I renew my objection. All counsel has done is show that the letter is unavailable. That is the first half. He does not show that he attempted to get the letter and he obviously, from his questioning, knew the letter was in existence or had some indication.

Mr. Gore: Your Honor, I consider it very ill-mannered [515] on the part of the United States Attorney to be jumping up and making objections to questions before I get a chance to finish the questions and I wish the Court would admonish him not to do so.

Mr. Plummer: If I have offended Mr. Gore, I apologize.

The Court: Counsel should wait until the ques-

(Testimony of Claude Kenneth Brownfield.)

tion is completed unless it is, of course, detrimental to the proceedings.

Mr. Plummer: And that was the reason, of course, I jumped up.

The Court: Mr. Gore, did you have any prior knowledge that that letter had been written by this witness to Fairbanks?

Mr. Gore: Only by hearsay, your Honor. I certainly did not see one. I might state to the Court that I have been informed that such letter has been written or various correspondence has been had.

The Court: Mr. Plummer, do you have the original of that letter?

Mr. Plummer: No, your Honor, I have never seen it and I don't know what it contains. Mr. Gore, of course, is purporting to act as this man's attorney at one time; he should know.

The Court: Well, objection overruled. You may answer that question.

Mr. Gore: Would the—I don't believe, your Honor, that I quite got through asking the question. Would the Reporter read that part which I had asked? [516]

(Thereupon, the Court Reporter read question line 19, page 515.)

Q. (By Mr. Gore, continuing): —insofar as it affects your testimony in the case now on trial?

A. I do not think that letter affects my testimony in any way.

Q. Did you, following the writing of that letter, receive a reply to it from Mr. Yeager?



(Testimony of Claude Kenneth Brownfield.)

A. I have never received a reply to it.

Q. Was any reply to that letter communicated to you verbally by the United States Attorney for the Western District of Washington?

A. No, sir.

Q. Have you ever been arraigned on the charges now pending against you in Fairbanks?

A. Not that I know of.

Q. Have you had any conversation with either the United States Attorney for the Western District of Washington or any of his assistants relative to that charge now pending against you in Fairbanks?

A. Who is the United States Attorney of Western Washington?

Q. I do not know his name, Mr. Brownfield. I assume that had you had such conversation you would know to whom you were speaking.

A. I'm afraid you are assuming too much. [517]

Q. Then you—do you then state that you have had no conversation with a person who represented himself to be the United States Attorney for the Western District of Washington or one of his assistants relative to the case now pending in Fairbanks?

A. I didn't quite follow you.

Mr. Gore: Would the Reporter read the question, please?

(Thereupon, the Court Reporter read the question, line 1, above.)

A. I did have a conversation with, I believe it

(Testimony of Claude Kenneth Brownfield.)

was a United States District Attorney from Tacoma.

Q. Do you recall when that conversation was, Mr. Brownfield?

A. Approximately three weeks ago.

Q. Was last Wednesday the first date upon which you have been approached by anyone to appear in this court today and give testimony in regard to this case?

A. No, it was not.

Q. When were you first approached in that regard?

A. Almost a year ago.

Q. By whom were you approached?

A. Mr. Harkabus and I do not know who the other man was.

Q. Did he represent himself to be a police officer?

A. I believe he did, yes, sir.

Q. And did he not represent himself to be Lt. William Trafton of the Territorial Police? [518]

A. I have never talked with Lt. Trafton that I remember of since I left Fairbanks.

Q. You know Lt. Trafton, do you not?

A. Yes, sir, I do.

Q. And that conversation occurred down at McNeil Island about a year ago, say, in February or March of '57?

A. Approximately there, yes.

Q. At that time, then, were you questioned relative to any connection that Mr. Ing might have had with this case?

A. I don't recall.

Q. Did you at that time give the same story to

(Testimony of Claude Kenneth Brownfield.)

the law enforcement officers or Mr. Harkabus that you gave the Court here today?

A. Mr. Harkabus did not question me on any story that I might have to say.

Q. Did the police officer who was present?

A. No, sir.

Q. Did you class that little visit as a social visit?

A. No, it was not a social visit.

Q. Was it your testimony this morning that these checks were delivered to you in Chicago, Illinois, by a person who was unknown to you?

A. Yes, sir.

Q. As a matter of fact, Mr. Brownfield, did you not procure these checks or procure the printing of these checks yourself [519] from a person with whom you had previously been confined in the penitentiary in the state of Illinois?

A. Do you want a direct answer or can I assume that you are assuming that question?

A. I would like a direct answer, Mr. Brownfield, either yes or no?      A. You are mistaken.

Q. Do you recall when Mr. Padotey left the City of Chicago and came to the City of Fairbanks?

A. Approximately, yes.

Q. Would you give us the approximate date?

A. I think it was June, 1956, probably a little earlier.

Q. Did John Volk drive up the highway with you?      A. I was not there when they left.

Q. You do know though that they left together?

A. I can assume that. I don't know it.

(Testimony of Claude Kenneth Brownfield.)

Q. You knew that they planned to leave together? A. No, sir.

Q. Did you later find out that they did, in fact, leave together and drive up the highway together?

A. Yes, sir, I did.

Q. Did you have any correspondence with Mr. Padotey during the period of time between his departure for Fairbanks and your departure for Fairbanks? A. I don't recall of any. [520]

Q. Do you recall any telegrams that you sent to Mr. Padotey during that period of time?

A. I believe I did, yes, sir.

Q. And did you not send him a telegram in August of 1956 in words as follows: "Paper is okay. Will arrive with the children"?

A. I don't recall that telegram.

Q. Did you state this morning on direct examination that you paid your transportation and that of Mr. Hausam and Mr. Eckley to Fairbanks?

A. Yes, sir, I did.

Q. Were you met at the airport in Fairbanks by any person? A. Yes, sir, I was.

Q. Was that John Scott and Frank Padotey?

A. Yes, sir, it was.

Q. Then you had informed Mr. Padotey of your arrival in Fairbanks? A. Yes, sir.

Q. Where did you stay after you arrived in Fairbanks?

A. At the Fairbanks Golf and Country Club.

Q. Where did Mr. Padotey stay during your residence in Fairbanks?

(Testimony of Claude Kenneth Brownfield.)

A. I believe he was living in the basement of Mr. Ing's house.

Q. You have known Mr. Padotey for a lot longer period of time than you have known Mr. Ing, have you not? [521]

A. Yes, sir.

Q. As a matter of fact, you were employed by Mr. Padotey there in the City of Chicago, Illinois, were you not?

Mr. Plummer: I object to the question. It's been asked and answered.

The Court: Well, that particular question was not asked and answered.

Mr. Plummer: I guess not.

The Court: Objection overruled. You may answer that question.

A. The only job I have had in Chicago I have been employed by Joseph Janas.

Q. (By Mr. Gore): But you know, as a matter of fact, that Mr. Janas' only connection with that business is to hold the liquor license for Mr. Padotey for the reason that Mr. Padotey cannot, under the law of the state of Illinois, have a liquor license, do you not?

A. I believe you are mistaken.

Q. Would you state that Mr. Padotey was not prohibited by reason of his criminal record from holding a liquor license in the state of Illinois?

Mr. Plummer: I object as being immaterial.

The Court: Objection sustained. It is immaterial to this issue. [522]

Q. (By Mr. Gore): Was it your testimony that Mr. Ing was in Chicago and that your conversation



(Testimony of Claude Kenneth Brownfield.)

or your meeting with him occurred in either February or March, 1956?      A. Yes, sir.

Q. And should it appear here that Mr. Ing was in Hawaii during that period of time, do you suppose you might be mistaken as to the dates?

A. I believe I stated this morning at approximately that time.

Q. Well, do you recall any independent incident which might in some way make you be able or cause you to be able to more closely fix that date?

A. I can positively say that Mr. Ing had just returned from Hawaii because he had just boughten a new Cadillac and it had Hawaiian license plates on it.

Q. Can you positively state that Mr. Ing was not in Hawaii during the months of January, February, and March?      A. Beg your pardon?

Q. Can you positively state that Mr. Ing was not in Hawaii during the months of January, February, and March of 1956?

A. No, I can't state that.

The Court: Mr. Gore, the Court Reporter would like to have a recess. Without objection then, the Court will go into recess for a period of 10 minutes.

(Whereupon, at 3:15 o'clock p.m. following a [523] 15-minute recess, court reconvened, and the following proceedings were had:)

The Court: Let the record show all the jurors are back and present in the box. You may continue, Mr. Gore, with your cross-examination.

(Testimony of Claude Kenneth Brownfield.)

Q. (By Mr. Gore): As a matter of fact, Mr. Padotey, weren't the men who—or, the man who printed up these——

A. I am Mr. Brownfield.

Q. Beg your pardon. A. Thank you.

Q. Weren't the men or wasn't the man who printed up these checks from Alton?

A. No, sir.

The Court: I am sorry. Is that a city, counsel?

Mr. Gore: Pardon, your Honor?

The Court: Is that a city?

Mr. Gore: Yes, Alton, Illinois.

The Court: Thank you.

Mr. Gore: Your Honor, before I proceed in my next line of examination, I perhaps better approach the bench with the United States Attorney.

The Court: Very well, you may do so. Do other counsel desire to come——

(Thereupon, all counsel approached the bench, [524] together with the Court Reporter, and the following proceedings were had out of the hearing of the jury:)

Mr. Gore: The Court has previously ruled that I could not, at that time, question this defendant or this witness relative to his acquaintanceship and the nature of his acquaintanceship with a Mr. Padotey. I believe at this time, your Honor, that I would be entitled to go into a line of questioning which would develop that this witness became acquainted with Mr. Padotey at the time when they were both in-

(Testimony of Claude Kenneth Brownfield.)

mates of the state penitentiary in the state of Illinois and that he also at that time became acquainted with the mysterious person, Volk, about who certain statements have been made in connection with the offense.

The Court: What has developed, counsel, that would indicate that you'd be justified under the law?

Mr. Gore: The witness has testified, your Honor, relative to his—how he first became acquainted with Mr. Ing and that he was introduced to Mr. Ing by the person, Padotey, in a bar in the City of Illinois and that he has also from that date continued the acquaintanceship and he has placed Mr. Padotey in the City of Fairbanks and he has had Mr. Padotey meet him at the airport and he has testified that he lived at the Country Club at which Mr. Padotey was either employed or which he was a partner, and I believe that we should be able to develop by cross-examination from this witness the more close relationship between this [525] witness and Mr. Padotey than his relationship with Mr. Ing, and from that the jury should be able to infer that it would have been more likely that this deal or this transaction to which Mr. Brownfield has testified, originated in the mind of Mr. Padotey rather than in the mind of Mr. Ing, as testified to by this witness.

The Court: The difference between Mr. Padotey and Mr. Ing is that Mr. Padotey is not under indictment and on trial; Mr. Ing is.

Mr. Gore: That certainly is no fault of ours, your Honor.

(Testimony of Claude Kenneth Brownfield.)

The Court: That is true. On the other hand, you are at liberty to call this witness.

Mr. Gore: Well, may we then make a showing, your Honor, that we have endeavored to obtain his presence here in the City of Fairbanks—or, in the City of Anchorage to give testimony in this case and that he is unavailable and that—also that the United States Attorney has made effort to secure his presence to appear in the City of Anchorage and that the United States Attorney failed in his effort to secure his presence here in the City of Anchorage.

The Court: Of course, that fact would be proper. You misunderstood me. I meant you could call Mr. Brownfield as your witness and elicit that testimony if you want to.

Mr. Kay: I certainly feel it would be proper cross-examination. I think we are unduly limited on the scope of cross-examination if we can't go fully into the relationship of this man Padotey.

Mr. Plummer: I think there has been no additional showing made since the time of your Honor's prior ruling and I don't think the issues in the case relate at all; was immaterial then and there's been no testimony introduced then and now.

Mr. Kay: The original objection of the United States Attorney to question this man concerning his acquaintanceship with Padotey in the penitentiary is based on the fact it might tend to humiliate or embarrass this man, improper because it had not yet been brought out that he had been convicted of a

(Testimony of Claude Kenneth Brownfield.)

crime. We have now brought that out. He has admitted being in the penitentiary. There is no embarrassment or humiliation additional that could be caused by merely asking him if the acquaintanceship with Padotey was not in the penitentiary.

Mr. Plummer: But, your Honor, his acquaintanceship with Mr. Padotey, whatever it may be, is not an issue in this case.

Mr. Kay: It most definitely is.

Mr. Plummer: Not an issue in this case.

The Court: Do you wish to be heard?

Mr. Nesbett: I still feel that with six named defendants, at least two or three named in each count, the scope of the cross-examination is being limited by not allowing them [527] to go into the Padotey aspect in full. In fact, it may bring out that Padotey is responsible for the crime or ringleader of it. Whether he's a defendant or not, that doesn't matter—and have a right to show it.

The Court: Well, of course, if you did not have a witness—or, this witness available to bring that fact out on your defense, then I'd agree with you, but that is not the case. The witness is here and you can call him under the rule. Objection sustained.

Mr. Gore: Your Honor, may we then at this time take the witness off of the witness stand temporarily for making a showing that we have attempted to obtain the presence of the witness Padotey and that we have been unable to do so and may we introduce in evidence a wire from Mr. Padotey in which he



(Testimony of Claude Kenneth Brownfield.)

flatly refuses to come to the City of Anchorage to give testimony regarding this case?

The Court: I have no objection myself. What position does the Government have?

Mr. Plummer: As I understand it, Mr. Padotey is a relative of the defendant Ing.

Mr. Kay: Relative?

Mr. Plummer: Isn't he?

Mr. Kay: No.

Mr. Plummer: At least he's a business partner.

Mr. Kay: Former business partner. [528]

The Court: What is your position now, as to the defense making a showing that they have tried to get Padotey and can't get him?

Mr. Plummer: I will say this, your Honor: That they may not be able to get him starting this afternoon, but I cannot conceive why he would not have to respond to a criminal subpoena issued by this Court.

Mr. Gore: Your Honor, he didn't respond to one which was issued by the United States Attorney's office.

The Court: Well——

Mr. Gore: And I think the United States Attorney——

Mr. Plummer: I don't know that they actually had—whether one's been issued and served on him.

The Court: But there is only one thing before the Court, that is, do you have any objection to the defense making a showing at this time that they can't get Padotey?

(Testimony of Claude Kenneth Brownfield.)

Mr. Plummer: May I have just a minute?

The Court: Yes, you may.

Mr. Plummer: At this time I think I do have these: This is a material witness to their case and if they can't have him here when they put on their case, to show the Court that they have made due and diligent effort to get him here and weren't able to do that and do whatever—at that time if they are still unable to get him and they convince the Court that they have used every means available, they could then call this witness as [529] their witness and elicit the testimony that they are now attempting to elicit from him on cross-examination.

The Court: I will have to sustain the objection under the facts because this is the Government's case now. It would be improper to interrupt them.

(Thereupon, all counsel and the Court Reporter resumed their respective seats, and the following proceedings were had in the presence of the jury:)

Q. (By Mr. Gore): Mr. Brownfield, do you have the general reputation in and around the City of Chicago for being a thief?

Mr. Plummer: Objection, highly improper.

The Court: Objection sustained.

Mr. Gore: Your Honor, I would like to be heard on that.

The Court: I will hear you, Mr. Gore.

Mr. Gore: I seek to elicit from this witness just why a person like the defendant Ing would approach Mr. Brownfield in a bar in the City of

(Testimony of Claude Kenneth Brownfield.)

Chicago, not being previously acquainted, and make any such offer as to which Mr. Brownfield has testified.

Mr. Plummer: I suggest, Mr. Gore, that he elicit that information from Mr. Ing; perhaps he has the answer. He should not ask this witness an improper question and that is one.

Mr. Kay: That is a proper question under the Alaskan statute. [530]

Mr. Plummer: He can't testify as to his own reputation.

Mr. Kay: He can if he knows it. The general reputation of a witness is always proper under the Alaska statute.

The Court: That's true, but not from the witness himself. Objection sustained. Reputation isn't what he says about himself; it's what other people say about him.

Q. (By Mr. Gore): Mr. Brownfield, how long had you been talking to Mr. Ing before he approached you with this check proposition to which you have testified? A. Approximately a week.

Q. You seen him on regular occasions during that period of time?

A. What is your definition of regular?

Q. Did you see him every day?

A. No, sir.

Q. Did you see him every other day?

A. Approximately.

Q. How many hours do you suppose that you had been engaged in conversation with Mr. Ing

(Testimony of Claude Kenneth Brownfield.)

before he approached you with this proposition of engaging in a check venture with him in Fairbanks and Anchorage?

A. I have no idea, but probably not very many.

Q. Do you suppose that he was acquainted with the fact that you had last—previously done time in the penitentiary?

A. I believe he done time in the same penitentiary I was in at [531] the same time.

Q. Was he there when you and Frank Padotey was there? A. Not that I know of.

Q. Or when you and John Volk were there?

A. Not that I know of.

Q. Well, you and John Volk and Frank Padotey were all there at the same time, were you not?

Mr. Plummer: I object to further questions along this line.

Mr. Gore: I believe the witness brought it out himself.

The Court: Objection overruled this time.

Q. (By Mr. Gore): Would you answer the question, please, Mr. Brownfield?

A. You will have to ask it again.

Mr. Gore: Would you read it back?

(Thereupon, the Court Reporter read Question, Line 6, above.)

A. At approximately the same time.

Q. And you and Frank Padotey were cellmates, were you not?

A. You have some wrong information.

(Testimony of Claude Kenneth Brownfield.)

Mr. Kay: That's not an answer. It's a question, your Honor.

The Court: Wait a minute, one counsel at a time and Mr. Gore is questioning. You don't have the right——

Mr. Kay: I was just asking the court to—advise the court that that was not an answer. [532]

The Court: But, counsel, you haven't the right to object. You are not counsel under examination. One counsel at a time under the rules. You may proceed, Mr. Gore; nothing before the court.

Q. (By Mr. Gore): Rephrase the question then. Is there where you first became acquainted with Frank Padotey and John Volk? A. Yes, sir.

Q. And is that where you first became acquainted with the person who did the printing job for you?

A. I believe I have answered that question before.

Q. Where were you when Mr. Ing first proposed to you that you become associated with him in this check scheme?

A. Tavern at 4700 South Wentworth.

Q. What was the occasion for that meeting?

A. I believe we were just drinking.

Q. Can you state how many previous occasions that you had conversations with Mr. Ing?

A. No, sir, I can't.

Q. Was Frank Padotey with you on the majority of those occasions?

A. I don't recall him being with me.



(Testimony of Claude Kenneth Brownfield.)

Q. When he made the proposition to you did you immediately accept the offer?

A. No, sir. [533]

Q. How long did you think it over before you accepted that offer?

A. Probably two months.

Q. Did you not testify this morning on direct examination that when he suggested it that you agreed to participate in it?

A. I was under the impression that I testified I would give it some thought and he later contacted me and I agreed.

Q. And how did he contact you?

A. By letter.

Q. And, of course, you do not have that letter?

A. No, sir, I don't.

Q. Do you have anything in writing which would in any way implicate Mr. Ing in this, other than your own testimony here given from the witness stand?

A. No, sir, I don't.

Q. Now, in response to a previous question of mine, you made mention of the fact that you had a conversation with the United States Attorney or one of his assistants in the City of Tacoma, Washington. Would you, as best you can, fix the date of that conversation?

A. The conversation was at McNeil Island, but I believe it was about the first of February.

Q. Who was present at that conversation?

(Testimony of Claude Kenneth Brownfield.)

A. Another gentleman was present, but I didn't know his name.

Q. What was the name of the person with whom you talked? [534]

A. Mr. Baumhauser, something of that sort.

Q. And what was his official capacity, if you know?

A. He was connected with the District Attorney's office at Tacoma.

Q. Do you know the nature of that connection?

A. I think he is one of the assistants.

Q. What was the occasion for that visit?

A. He asked me if I had ever thought of using Rule 20 in regard to the detainer which was against me.

Q. Was that a voluntary visit on his part or was that in response to a request by you that he visit you?

A. I think it was a voluntary visit on his part, as far as I know.

Q. Do you have reason to think that the office of the United States Attorney for the Western District of Washington, Tacoma Division, would have knowledge of the pendency of charges against you other than any information that you conveyed to them about it?

Mr. Plummer: I object to the question. He can't possibly be asked about the knowledge that the United States Attorney's office down in Tacoma had. How would he have any knowledge?

Mr. Gore: I will rephrase the question.

(Testimony of Claude Kenneth Brownfield.)

The Court: Very well, you may proceed. Nothing before the Court. [535]

Q. (By Mr. Gore): Did the person with whom you discussed this matter indicate or give you reason to believe that he was making this visit to you in response to a request by the law enforcement officers or the District Attorney's offices in the Territory of Alaska?

A. No, sir, he never explained why he was asking me if I had ever thought of Rule 20.

Q. Did he explain to you what Rule 20 is?

A. He asked me if I was familiar with it.

Q. And you stated that you were?

A. I told him that I thought I was.

Q. And was it his intention at that time to suggest to you that—I will rephrase the question. Did he advise you at that time that you could enter a plea under Rule 20? A. No, sir, he didn't.

Q. Well, will you state to the best of your recollection the conversation that you had with the gentleman at that time?

A. He informed me that he did not know if it was possible since it was a Territorial charge I was indicted under, if it could be under Rule 20, and I was of the impression that it was something of a sort of a test case to see if it could be done.

Q. Did he inform you whether or not he had had any correspondence with the authorities in Alaska relative to your case? [536]

A. He did not.

Q. Did you gather from his conversation that he

(Testimony of Claude Kenneth Brownfield.)

just wanted to pick your case up and make a test case out of it?

A. I never informed an opinion.

Q. Well, would you say that this was just another social visit?

Mr. Plummer: Objection. The question has been asked and answered.

The Court: Objection sustained. It's repetitious.

Mr. Kay: Not as to this visit.

The Court: Pardon me, Mr. Kay, you will have your turn in due course.

Q. (By Mr. Gore): Mr. Brownfield, have you discussed the testimony that you are to give, or that you have given in this case with anyone in relation to any sentence that might be imposed upon you in connection with the now standing charges in the Fourth Division?

A. No, sir, I haven't.

Q. Have you been informed by anyone in connection with this case that the fact that—or, of the fact that a conviction on the habitual criminal act could result in a sentence of life imprisonment?

A. I believe you informed me of that.

Q. Has any law enforcement officer mentioned that to you in connection with any recommendation that might be made in your [537] regard?

A. No, sir.

Q. Mr. Brownfield, after consistently for a period of more than a year and a half of refusing to answer any questions relative to this case, why is it that you, within 10 or 15 days of the date that you

(Testimony of Claude Kenneth Brownfield.)

again go to trial, and on the first day or the day that this case starts trial, why is it that you have suddenly decided to make statements relative to the check passing scheme?

A. I believe I have been persuaded by my wife.

Q. And would that have anything to do with your hope or with any promise that you might receive leniency in connection with the case pending in Fairbanks?

A. I have not discussed that with anybody.

Q. As a matter of fact, Mr. Brownfield, while you were in jail in Fairbanks, were you not made an offer of a suspended sentence if you would give testimony that would tend to connect James Ing with the commission of this offense?

Mr. Plummer: I object to the question unless he gives the time and place and in connection with what offense.

The Court: Objection sustained for the reasons stated.

Q. (By Mr. Gore): And, as a matter of fact, Mr. Brownfield, after your conviction on your plea of guilty in Fairbanks, did you not receive an offer of a recommended pardon if you would give [538] testimony tending to connect James Ing with the commission of this offense?

Mr. Plummer: I object on the same basis. In addition to that he has not shown who the pardon was supposed to be from or whether the person, if in fact he did, could get a pardon.



(Testimony of Claude Kenneth Brownfield.)

Mr. Gore: Your Honor, I believe it's proper cross-examination.

The Court: Upon the condition you lay the proper foundation. For the reason that you haven't laid the proper foundation, the objection is sustained; time, place, persons present.

Q. (By Mr. Gore): Mr. Brownfield, do you recall a conversation which you had with me in the Federal jail in Fairbanks, Alaska, in December, 1956, relative to offers which were made to you relative to giving testimony against James Ing?

A. Not in regard to myself, no.

Q. You have testified that it is on account of Mrs. Brownfield that you decided to appear here today and give testimony in this case. What about—or, what between you and Mrs. Brownfield would influence you to give such testimony?

Mr. Plummer: Object to the question. It's improper and clearly outside the scope of the direct examination, and, certainly, his feelings toward Mrs. Brownfield is never, was never any issue in this case.

Mr. Gore: Your Honor, I think I am entitled to go [539] into the interest of this witness and the outcome of any criminal prosecution.

The Court: Objection overruled. He may answer that question.

Q. (By Mr. Gore): Is it her hope, Mr. Brownfield—

The Court: Pardon me. You have asked one question. Objection overruled. Let him answer the question.

(Testimony of Claude Kenneth Brownfield.)

Q. (By Mr. Gore): Would you answer the question, please, Mr. Brownfield?

A. I never caught the full question. Would you please have it repeated?

The Court: Would you please read it back then.

(Thereupon, the Court Reporter read Question Line 17, Page 539.)

A. I am not certain, but I believe my feelings between Mrs. Brownfield and myself are my personal business and not of any interest to you or the Court. If I am wrong, I am sorry.

Q. (By Mr. Gore): I believe you are quite right, Mr. Brownfield. The question did not—did—I did not express in the question my intent at the time. During the course of your being influenced in this matter by Mrs. Brownfield, was it her desire that you give this testimony in hopes that you would [540] receive leniency?

A. I don't believe we have ever exactly discussed the matter that way in our letters.

Q. And what is your hope in the matter?

A. My future is rather uncertain. I actually have no hopes for the future.

Q. And you have made no agreements relative to the dismissal of one or more charges now pending against you in exchange for your testimony here today?

A. I have made no agreements.

Q. Have you had any discussion with any person or persons as to whether or not the case now

(Testimony of Claude Kenneth Brownfield.)

pending against you in Fairbanks will be brought on for trial on next Monday morning?

A. No, sir, I have not discussed it with anyone.

Q. Mr. Brownfield, you are aware that an order was entered in the District Court in Fairbanks requiring the United States Government to produce you in Fairbanks on the 15th day of February, 1958, for arraignment on those charges, are you not?

A. You informed me of that.

Q. And have you had any discussion with any person or persons which would lead you to believe or which would cause you to believe that there have been any changes in plans?

A. No, sir.

Q. Then so far as you are now informed, the case set for trial in Fairbanks next Monday morning will proceed as scheduled? [541]

A. Yes, sir.

Q. And you have made no deals with anybody relative to that case?

A. No, sir.

Q. And you have had no discussion with any proper officials relative to your entering a plea to the charges now pending against you?

A. No, sir.

Mr. Gore: Would the Court indulge me just a moment.

The Court: Very well.

Mr. Gore: Your Honor, I believe that I am about through with this witness and I wonder if I could have about a 5-minute recess to go through my notes taken on direct examination to make a

(Testimony of Claude Kenneth Brownfield.)

determination of whether or not I have any further questions.

The Court: I have no objection; do counsel?

Mr. Kay: No. Fine, your Honor.

The Court: Court will go into recess for a period of 10 minutes at this time and then we won't have to go into another recess.

(Whereupon, at 4:00 o'clock p.m., following a 10-minute recess, court reconvened and the following proceedings were had:)

The Court: Let the record show all the jurors are back and present in the box. You may continue, Mr. Gore. [542]

Mr. Gore: Thank you, your Honor.

Q. (By Mr. Gore): Mr. Brownfield, you testified that you had a conversation with a Deputy United States Marshal approximately a week ago. Where did that conversation take place?

A. McNeil Island.

Q. And would you again state his name?

A. James Chenoweth.

Q. Who was present at the time that conversation took place?

A. Mr. Harkabus and myself.

Q. Did Mr. Harkabus represent himself to you as a law enforcement officer?

A. Not that I know of.

Q. Did he give you any indication of his interest in this matter?

A. No, sir.

(Testimony of Claude Kenneth Brownfield.)

Q. How long have you been acquainted with Mr. Harkabus?

A. I am not acquainted with him.

Q. Did you know this deputy marshal?

A. No, sir.

Q. What time of day did that conversation take place?

A. About 2:00 in the afternoon, I think.

Q. Where did it take place?

A. I believe it was in the Island visiting room.

Q. That conversation related to your appearance here in Anchorage [543] in giving testimony in this case?

A. Yes, sir.

Q. Will you state that conversation to the best of your recollection?

A. I don't recall just which one it was, but I believe it was Mr. Chenoweth said that he felt in his investigation that I had knowledge that would help clear this matter up and he asked me if I would be willing to testify if I was returned to Fairbanks. I said that I would testify as to what I knew, but would not testify as to what I thought or what I surmised, or what I assume, and he said then that he would return me to Anchorage.

Q. And that sudden change of mind on your part was caused by communications which were had between your wife and yourself and not by any hope for reward for the giving of testimony?

Mr. Plummer: I object to the question. It's been asked and answered.



(Testimony of Claude Kenneth Brownfield.)

The Court: Objection overruled. He may answer this question.

A. It was not a sudden change of mind.

Q. Did they at that time hold out any hope of a reward to you?      A. No, sir.

Q. Did they at that time advise you that any statements which you made in connection with this case might also be used against you? [544]

A. Very definitely, they did.

Q. And had that change of mind occurred on or before the early part of December of 1957?

A. Beg your pardon there? I couldn't just understand your date.

Q. I believe you testified that it wasn't a sudden change of mind and I asked you whether or not that change of mind had occurred on or before December, the early part of December, 1957?

A. I don't recall.

Q. Did that change of mind have anything to do with your failure to respond to various letters which I, myself, have directed to you relative to the matter now pending in Fairbanks, since the first of December, 1957?

A. Your letters? Something has been wrong. I have never received any from you for almost three or four months.

Q. You have received no correspondence from me for three or four months?

A. That's right.

Q. Well, Mr. Brownfield, have you directed any communication to me relative to our—to the now

(Testimony of Claude Kenneth Brownfield.)

pending case in Fairbanks since the first of December in 1957?

A. At least three letters.

Q. When did you leave McNeil Island, Washington, returning to the City of Anchorage?

A. Today is Wednesday, isn't it? [545]

Q. That is correct.

A. A week ago today, 3:20 in the afternoon.

Q. When did you arrive in the City of Anchorage?

A. Last Thursday at approximately noon.

Q. And where were you taken upon your arrival in Anchorage?

A. I believe the Marshal's office.

Q. Have you been confined in the Federal jail since your arrival in Anchorage? A. No, sir.

Q. And where have you been held since you have been here?

A. I have been in the custody of Marshal Chenoweth.

Q. Then you have been confined at some place other than the Federal jail?

A. I have been confined at the Marshal's office in a small cell that is there.

Q. Now, on this charge or these charges which are now pending in Fairbanks, is it your intention to stand trial on those charges on next Monday morning?

Mr. Plummer: I object. The question has already been asked and answered.

(Testimony of Claude Kenneth Brownfield.)

The Court: Objection sustained, having been once asked and answered, counsel.

Mr. Gore: I was only laying a foundation for additional questions, your Honor, relative to statements which were made by Mr. Brownfield in the presence of the Court this morning. [546]

The Court: Well, even though that was your intent, the fact that they had been stated before would be sufficient to lay the foundation once for all subsequent questions; on that point, of course.

Mr. Gore: Yes.

Q. (By Mr. Gore): Did you not this morning, Mr. Brownfield, in a conference at the Judge's bench, formally release me from any further responsibility or liability in connection with your defense on those charges now pending in the City of Fairbanks? A. Yes, sir, I did.

Q. Have you made arrangements for other counsel to defend you in that proceeding?

A. No, sir, I haven't.

Q. Is it your intention to go to Fairbanks then and enter a plea of guilty to those charges?

A. Yes, sir, it is.

Q. Including the charge of a habitual criminal?

A. Yes, sir.

Q. And you know, of course, that that carries a mandatory life sentence under the laws of the Territory of Alaska?

Mr. Plummer: Object. It's already been asked and answered.

The Court: Objection sustained.

(Testimony of Claude Kenneth Brownfield.)

Mr. Gore: I have no further questions. [547]

The Court: Do other counsel have any cross-examination? Mr. Nesbett?

Mr. Nesbett: Defendant Smith has no cross-examination.

The Court: Thank you. Mr. Hepp?

Mr. Hepp: I have none, your Honor.

The Court: Mr. Kay?

Mr. Kay: I have no—I was under the belief, your Honor—we have been operating under the belief that only one of the counsel for Mr. Ing could cross-examine Mr.——

The Court: Yes, but the Court would be understanding in that respect.

Mr. Kay: Well, could I confer then just a moment, your Honor, because I have been under the impression that only one——

The Court: Well, that is the rule, but the Court is always willing to relax the rule in order to get justice.

CLAUDE KENNETH BROWNFIELD  
testifies as follows on

Cross-Examination

By Mr. Kay:

Q. Mr. Brownfield, I believe you testified concerning the conversation with an assistant United States Attorney from Tacoma in February of this year, did you not? [548]

A. Yes, sir.

(Testimony of Claude Kenneth Brownfield.)

Q. I believe Mr. Gore asked you if you would relate that conversation, and was not your reply that the District Attorney from Tacoma came over there to ask you about any interest you might have in a plea under Rule 20?

A. Yes, sir.

Q. Was that all the conversation that took place between you and that Assistant United States Attorney, Mr. Brownfield, on that occasion?

A. No, sir.

Q. Will you relate the rest of the conversation?

A. He informed me that he was at McNeil in regard to two or three other cases and that he did not explain why he talked with me or gave me no inkling as to why he talked with me other than the fact that he informed me that it was—he thought it was possible I could use Rule 20 and asked me if I had ever considered it and I said I had and he also informed me at that time that he could make no decision in the matter, that it was up to the Alaskan courts. I believe he—I don't believe he said "Alaskan courts," I believe he said Fairbanks court.

Q. Did he say Fairbanks court or Fairbanks United States Attorney's office?

A. Well, I believe he said "court." I am not sure.

Q. In any event, it was the branch of the law enforcement in the Territory of Alaska, located in the City of Fairbanks? [549]

A. Yes, sir.

Q. Now, and that is all the conversation was?

A. Well, there was nothing else other than the



(Testimony of Claude Kenneth Brownfield.)

fact that he informed me that he was of the opinion that each of the first four counts carried a maximum of 20 years and the last count carried a maximum of life.

Q. Well, then, you were well aware that the conviction of this habitual criminal act would carry a life sentence or could carry a life sentence?

A. Yes.

Q. Now, in discussing this question of a possible plea under Rule 20, didn't he discuss with you the possible sentence which you might receive if you did decide to enter a plea under Rule 20 other than just merely telling you what the maximum was?

A. No. He made it very clear to me that his office had nothing to do in the matter other than accept the recommendation from Fairbanks.

Q. I see. Well, did he give you any indication of the attitude of Fairbanks in making a recommendation of a sentence under Rule 20?

A. No, sir, he did not and that's—I never did understand exactly why he talked with me.

Q. Well, did he leave the impression that if you entered a plea under Rule 20 down there that the recommendation at Fairbanks [550] would be the maximum on each of the four counts or five counts, including the habitual criminal count?

A. He never even went into the phase of that thing.

Q. Well, I take it that this conversation didn't come to anything; at least, you didn't decide to avail yourself of Rule 20?

(Testimony of Claude Kenneth Brownfield.)

A. No, sir, that conversation came to absolutely nothing, you might say.

Q. Did you hear anything further from him?

A. Not a word.

Q. Or anything from the authorities in Fairbanks with reference to the use of Rule 20 in availing yourself of it in Tacoma?

A. No, sir, I never heard a word.

Q. Then until Mr. Harkabus and Mr. Chenoweth came down to see you a week ago, you had had no further contact with the Alaska law enforcement authorities concerning this?

A. No, sir, their visit was a total surprise.

Q. And you have testified that it's your intention to go to Fairbanks——

The Court: Pardon me.

Mr. Kay: Pardon me.

The Court: We won't go over that again, Mr. Kay.

Q. (By Mr. Kay): Mr. Brownfield, let me ask you this: Isn't it a fact that [551] you have been assured by someone in connection with the law enforcement authorities, and I frankly don't know whom, but isn't it a fact that you have been assured by someone purporting to act as a representative or from the Fairbanks United States Attorney's office, that if you testify in this case, and if you enter a plea to the first four counts of the indictment pending against you in Fairbanks, Alaska, that you will receive either a suspended sentence or a light concurrent sentence on those four counts in

(Testimony of Claude Kenneth Brownfield.)

Fairbanks and that the count against you as a habitual criminal will be dismissed?

A. No, sir, no one has ever told me that.

Q. Have they ever given you a hint to that effect? A. No, sir.

Q. Isn't that the bargain which you offered to make with the office—with the representative of the United States Attorney's office in Tacoma when they came to see you at McNeil Island?

A. No, sir, it isn't.

Q. It is not a fact that you offered to make such a bargain, plead guilty to the first four counts if they—— A. No, sir.

Mr. Plummer: I object to counsel arguing.

Mr. Kay: I am not arguing.

The Court: Well, Mr. Kay, I think this last question [552] has been asked once before and covered.

Q. (By Mr. Kay): Let me ask this final question. Is it not your hope that you plead to the first four counts of the indictment against you and that upon your plea they will dismiss the habitual criminal act against you?

A. A person may have many kinds of hopes.

Q. And that is yours, is it not?

A. Not necessarily, no.

Q. Not necessarily. Thank you.

The Court: Any redirect, Mr. Plummer?

Mr. Plummer: No, your Honor.

The Court: Very well. You may step down. May this witness be excused?

Mr. Plummer: As far as the Government is concerned he may be.

The Court: Very well.

(Thereupon, the witness was excused and left the stand.)

The Court: You may call your next witness.

Mr. Plummer: I'd like to call Mr. Yokely. He's down the hall, I think.

### ERNEST YOKELY

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on [553]

### Direct Examination

By Mr. Plummer:

Q. Will you please state your name, sir?

A. Ernest Yokely.

Q. Where do you live, Mr. Yokely?

A. 1806 East I.

Q. That is in Anchorage? A. Yes.

Q. And were you in the Anchorage area during the Labor Day week end of 1956? A. Yes.

Q. And did you have occasion at that time to visit the home of Eli Williams?

A. I don't know whether that was the correct day or not.

Q. Well, let me ask you this question, sir: Do you remember the shooting out at Ford's Cafe when Ben Wroe got killed and the Crawford—Mr. Crawford, or, one of the Crawfords got shot?

A. I heard of it.

(Testimony of Ernest Yokely.)

Q. Does that help fix it in your mind? Was it that week end?

Mr. Hepp: I object to counsel's suggesting to this witness the date that he desires him to testify to.

The Court: Well, the witness apparently doesn't have an independent recollection of that particular time, therefore, under the circumstances, certain leading questions are permitted. [554] I don't know whether or not this has gone too far. Would you read it back, please.

(Thereupon, the Court Reporter read back Line 15 through Line 20, Page 554.)

The Court: Objection overruled. You may proceed.

Q. (By Mr. Plummer): Would you answer the question, sir?

A. Would you ask it again?

Mr. Plummer: Would you read the question?

The Court: Didn't you just hear it now, Mr. Yokely? Did you not hear her read it to you now?

A. No, I didn't.

The Court: Very well, will you read it back, please.

(Thereupon, the Court Reporter read back the question on Line 20, Page 554.)

A. I don't know.

Q. (By Mr. Plummer): Sir, would you tell me when you were at the Eli Williams' residence if anybody else was there?



(Testimony of Ernest Yokely.)

Mr. Hepp: Now, I object to that unless the time and place is fixed here. He hasn't even testified that he was out at the residence as I recall. I think counsel testified to that and asked him if perhaps that wasn't on a given week end.

The Court: Mr. Plummer, you will have to lay the proper foundation and that is, ask him whether or not he's ever [555] been there, as Mr. Hepp points out to you.

Q. (By Mr. Plummer): Have you ever been at the home of Eli Williams? A. Yes, I have.

Q. And were you there sometime around the Labor Day week end of 1956?

A. I think so.

Q. All right, and do you remember about the time of the day it was, sir? A. No, I don't.

Q. Do you remember whether it was in the afternoon or the evening?

A. I think it was in the afternoon.

Q. And do you recall who—what you did there on that occasion?

Mr. Hepp: I object. I don't think this "occasion" has been established. He doesn't even remember when he was there.

Mr. Plummer: The record—

Mr. Hepp: At least I am very definite in my mind as to his answers. He doesn't remember it. He says it "may have been" around the week end.

Mr. Plummer: If that is the best he can do—

Mr. Hepp: Well, if it's not material established—

(Testimony of Ernest Yokely.)

Mr. Plummer: I think they are, or Mr. Yokely wouldn't be in the courtroom.

The Court: Well—— [556]

Mr. Hepp: I believe this is quite important, your Honor, as to when the date was.

The Court: Of course, I appreciate that counsel. Mr. Plummer, you should seek to try to focus it more clearly, if you can, as to the date in question.

Q. (By Mr. Plummer): Do you remember the week end when Ben Wroe got shot?

Mr. Hepp: I object to that.

The Court: Objection overruled. Now, you can't have your cake and eat it, too, counsel. You objected to him asking the question because he hasn't laid a foundation. Now, you object to it when he tries to lay it.

Mr. Hepp: My objection was this has already been answered. Counsel asked him and he answered it.

Mr. Plummer: Then do you withdraw your objection as to no foundation?

Mr. Hepp: I don't recall having made the foundation objection.

Mr. Plummer: I'm sorry.

The Court: Well, as I recall, there was objection because of—foundation hadn't been properly laid.

Mr. Kay: Well, the witness' answer was he didn't know.

The Court: Now, Mr. Kay, you are not in this, please. You will have your turn. Mr. Kay has an

(Testimony of Ernest Yokely.)

irresistible impulse. [557] That is the best definition of "irresistible impulse" I have ever seen.

Mr. Kay: I plead guilty.

The Court: That is said in good faith, Mr. Kay.

Mr. Kay: Yes, indeed.

The Court: Pardon me, let's get back now to the record. If Mr. Hepp has objected to the question as having been asked and answered, then the objection will be sustained.

Mr. Plummer: May I state the Government's position and that is as to the foundation and so on like that? Your Honor, the witness can only do the best placement that he can as regards the time.

The Court: Well, counsel, would you mind making one more attempt to see if you can fix in focus more clearly.

Mr. Plummer: Yes, sir; may I have just a minute, your Honor?

The Court: You may. (Slight pause.)

Q. (By Mr. Plummer): Mr. Yokely, do you recall the conversation out in this hallway within the last hour with a Mr. Dankworth and an Officer Barkley from the Territorial police?

Mr. Hepp: Just a moment before you answer. I certainly object to that as no relationship to the issues here—what somebody may have told him. It obviously calls for hearsay. I know that this is a premature objection but I am certain that [558] the violent question is what was that conversation, or, did it suggest anything to this witness and we

(Testimony of Ernest Yokely.)

believe that he should testify as to his own independent recollection or not at all.

The Court: Well, there again, though, counsel, that isn't the law. I am sure you will bear with the Court when I state that if a witness cannot answer specifically a particular question asked that counsel, whether it was you or the Government, has a right to suggest a time and/or ask a leading question within reason, and that same consideration would be accorded you as it is the Government.

Mr. Hepp: I submit that counsel has already asked that leading question and that is: Was he out there on the Labor Day week end. Nothing could be more leading than that and this witness stated he didn't know and I don't know how it could be established the fact that he does know now when he didn't know in response to a direct leading question. I don't mean to argue with the Court. I was merely raising a point.

The Court: Yes, but the fact that this witness cannot answer a leading question doesn't mean that the counsel asking the leading question, if permitted under the rules, could not ask another leading question.

Mr. Hepp: Well, I am afraid I'd have to lodge an objection to the Court's ruling on leading questions.

The Court: You may do so. The record may reflect the fact that Mr. Hepp objects to the Court's overruling his objection [559] on the question of leading questions; therefore, you may proceed.

(Testimony of Ernest Yokely.)

Q. (By Mr. Plummer): Would you answer the question, sir?

Mr. Hepp: May I have that question read again? I don't even remember it now.

The Court: Well, Mr. Plummer, would you please reask the question?

Mr. Plummer: Yes, sir.

Q. (By Mr. Plummer): Did you, sir, within the last hour have a conversation with an Officer Barkley and an Officer Dankworth, one gentleman being dressed in a plaid shirt and one gentleman being dressed in a brown suit, in the Federal Building here?

A. They talked to me over in the jail.

Q. Did you have a conversation with them over in the jail? A. Yes, sir.

Q. And would you be good enough to tell us what your conversation was about?

Mr. Hepp: Now, I object to that.

The Court: Objection sustained.

Q. (By Mr. Plummer): Were you at the home of Eli Williams on or about Labor Day of 1956?

Mr. Hepp: I object to that. He has asked the question. This witness answered and said he didn't know. [560]

The Court: Objection sustained, as it's repetitious, Mr. Plummer. That does not preclude you, though, from asking another question.

Mr. Plummer: Let me ask the witness this question:

Q. (By Mr. Plummer): Has he ever been—



(Testimony of Ernest Yokely.)

Mr. Yokely, have you ever been at the home of Eli Williams when Raymond Wright, John Walker and Dewey Taylor were also present at that home?

Mr. Hepp: Just a moment, sir, before you answer. I'd like to object to that unless it's tied into time and place and relates to the issues before this court. It could be extraneous issues and we could be here all night.

The Court: Objection overruled. He may answer that question.

A. Yes, I was.

Q. (By Mr. Plummer): Would you give us your best estimate, sir, as to the time when this happened and occurred?

A. I don't know exactly what day it was.

Q. Would you give us your best estimate, sir?

A. Well, the best of my knowledge, I'd say it was about a year ago.

Q. In the wintertime?

Mr. Hepp: I object to his arguing with the witness.

Mr. Plummer: No, I asked him. [561]

Q. (By Mr. Plummer): Was there snow on the ground, sir? A. No, there wasn't.

Q. What was the weather? Do you recall?

A. Pleasant weather.

Q. Pleasant weather. Do you recall how you were dressed on that occasion?

A. No, I don't remember.

Q. Do you recall how Mr. Wright, Mr. Walker and Mr. Taylor were dressed?

(Testimony of Ernest Yokely.)

A. Offhand, no.

Q. And did you have some conversation with the people there on that occasion?

Mr. Hepp: Now, I object to that. I don't see how it relates to the issues before this court. He says "about a year ago." I think that would be in February and there is certainly nothing before this court to set a suggestion, February, 1957, that relates to the issues before this court.

The Court: Well, Mr. Hepp, it appears to the court that the witness did testify that it was pleasant weather and not in the wintertime, so, therefore, it would not be a year ago.

Mr. Hepp: Well, I submit, your Honor, at least to me this is very pleasant weather, and not wintertime; yet, right now——

The Court: I recall he also testified there was no [562] snow on the ground.

Mr. Hepp: Well, I believe that that is nearly true.

The Court: Objection overruled. You may answer.

Mr. Plummer: What was the question, Bonnie? Would you read it back, please?

(Thereupon, the Court Reporter read back the Question on Page 562, Line 12.)

A. We was there; just had a few drinks.

Q. Can you give me any idea, sir, was this before or after the shooting out at Ford's Cafe when Ben Wroe was killed?

(Testimony of Ernest Yokely.)

A. I think it was after.

Q. And do you have any idea of the length of time after?      A. No, I don't.

Q. Could it have been before?

Mr. Hepp: I object to that as calling for purely a speculation on the part of the witness and I object to it for that reason. It's not a positive offer to which I can analyze objection.

The Court: Well, objection will be sustained to the last question.

Q. (By Mr. Plummer): Was it before?

A. I don't know exactly when it was that that shooting occurred out there at Ford's Cafe.

Q. Well, was this before or was it after the shooting? [563]

A. I said I think it was afterwards; I don't know definitely.

Q. Was it at the same week end of the shooting?

A. I don't know definitely.

Q. Either that it was or wasn't?

A. I don't know.

Mr. Plummer: I have no further questions.

The Court: Any cross-examination?

Mr. Hepp: I have no questions.

The Court: Very well, you may step down, Mr. Yokely. Thanks for coming.

Mr. Kay: I have a few questions.

The Court: Pardon me, Mr. Yokely, Mr. Kay has a question.

ERNEST YOKELY

testifies as follows on

Cross-Examination

By Mr. Kay:

Q. Mr. Yokely, have you ever been convicted of a crime? A. Yes.

Q. One or more? A. One.

Q. And you are now under arrest and waiting trial for another charge against you, are you not?

A. I don't know definitely; I think so. [564]

Q. Well, there's been a charge placed against you for attempting to escape? A. Yes.

Q. And you haven't been tried on that yet, have you? A. No.

Q. You don't know what the disposition of that is going to be, if any? A. No, I don't.

Mr. Kay: No further questions.

The Court: Any redirect?

ERNEST YOKELY

testifies as follows on

Redirect Examination

By Mr. Plummer:

Q. As a matter of fact, didn't my office convict you of white slavery during this last winter?

A. Yes.

Q. And haven't we also filed charges against you for escaping from the prison?

A. That is right.

(Testimony of Ernest Yokely.)

Q. Would that have anything to do with your inability to remember the date on this occasion?

A. No.

Mr. Plummer: No further questions. [565]

The Court: Very well, you may step down, Mr. Yokely.

(Thereupon, the witness was excused and left the stand.)

Mr. Plummer: May I have just about a 5-minute recess, your Honor?

The Court: Very well, without objection. Any objection?

Mr. Gore: No.

The Court: Court will go into recess for a period of five minutes.

(Whereupon, at 4:45 o'clock p.m., following a 5-minute recess, court reconvened, and the following proceedings were had:)

The Court: Let the record show that all the jurors are back and present in the box. Mr. Plummer, you may call your next witness.

Mr. Plummer: The prosecution rests, your Honor.

The Court: Very well. Counsel for the defense may make their opening statement at this time, Mr. Hepp and Mr. Kay.

Mr. Hepp: At this time we would like the customary motions at the close of the prosecution.

The Court: Very well, you may approach the bench.



Mr. Hepp: I am afraid they will be more extended in the company of the jury, and recognizing the hour as being ten to 5:00, well, I just doubt that we could prepare and present them in the interests of our clients, under the circumstances of crowding around the bench and whispering and having the jury and I [566] think they may be extended also.

The Court: Now, in that respect, could counsel advise the Court how many witnesses they intend to call, assuming that your motions are not favorably ruled upon?

Mr. Hepp: Well, I believe that this motion may deal directly with a matter of whether or not the trial goes on or not.

The Court: Of course, I appreciate that. Well, surely, you must have some indication so I can plan my work.

Mr. Kay: If we are required to, I intend to present three, possibly four witnesses, your Honor, on behalf of the Defendant Ing.

The Court: Mr. Hepp?

Mr. Hepp: Well, one, possibly two, very short ones, and there is a small chance of a third. I haven't quite made up my mind.

The Court: Thank you. Mr. Nesbett?

Mr. Nesbett: Your Honor, I am not in a position to be able to say until after the motions are argued.

The Court: Very well. Suppose we consider this then, counsel: that we came in early tomorrow

morning and heard these arguments and then had the jury come in at the regular time.

Mr. Kay: I am perfectly willing to work over-time, your Honor, in order to serve the convenience of the Court and the jury, however, I'd like to point out that we have proceeded at a fairly leisurely pace so far in the case. We have had a long week end [567] intervened and—in other words, the Government has not been pressed at all in the presentation of their case, and I hope that the same feeling will be present during the presentation of the defense case, which will not be long.

The Court: I can assure you that that will be the case.

Mr. Kay: I hoped that it would. May I ask then, your Honor, that if your Honor does want to take up early, since we will have to work tonight, of course, and in the morning to getting ready, in the event that our motions are not prevailing, may I suggest that we meet at 9:30 and perhaps let the jury come in at 11:00 because I am sure that the arguments are going to be—on my part the arguments are going to be extensive and I hope convincing.

Mr. Hepp: I submit to the Court that perhaps the entire morning could be consumed in arguments and it may be advisable for the Court to consider dismissing the jury until the afternoon session. I am quite sure that there will be some time spent in this matter.

The Court: Well, I perceive it will be some time, but that is an unusually long time for this type of

motion, unless there is something I don't perceive or haven't seen. I am not of the opinion it will take that long. I point out to counsel, under the rules, the rules are that they are not allowed that length of time to argue without a proper showing.

Mr. Kay: Considering the number of counsel I don't think [568] that the rules would—my suggestion—would certainly not exceed the length of time allowed under the rules, your Honor—meeting at 9:30 and having the jury come in at 11:00 would certainly not—considering the fact that the United States Attorney and four counsel may argue.

The Court: Well, as I recall, aren't arguments limited to 15 minutes unless otherwise—

Mr. Kay: Three, four counsel would be 60 minutes and we assume that Mr. Plummer only takes a half hour to reply to all four.

The Court: I am calling to Rule 3(7), "Unless otherwise specially ordered, no longer than one-quarter hour shall be allowed each party for argument upon any motion, or on any hearing, other than a final hearing on the merits; \* \* \*"

Mr. Kay: That would take then, your Honor, at least an hour. If we adhere very strictly, your Honor, to the rule it would take one minute longer than—each counsel having 15 minutes it would require one hour for arguments to be heard.

The Court: What would be wrong with coming in at 9:00 o'clock and excusing the jurors until 10:30?

Mr. Kay: The only objection I would have to it, is that we have got a lot of work to do tonight and

I don't like to go to bed at midnight or 1:00 o'clock and have to get up at 7:00 o'clock in order to be here at 9:00. From my point of view, I'd like a little more time than that to sleep and prepare for this [569] defense for this most important case.

Mr. Hepp: I'd like to submit to the Court I don't even have my office here and I'm under some handicap in getting my work out and I have had to avail myself for the use of other offices and I can't schedule my hours quite like I could in Fairbanks.

The Court: Well, let's compromise, counsel, let's make it 9:15 and then the jurors could be excused until 10:30. That then will give you an hour and 15 minutes. That will allow you extra time, Mr. Kay—without objection. Ladies and gentlemen of the jury, you are now excused to report tomorrow morning at the hour of 10:30. As you know, you are instructed not to discuss this case among yourselves, nor are you permitted to let others discuss it with you, and this Court will stand adjourned until tomorrow morning at the hour of 9:15.

(Thereupon, at 5:00 p.m., court was adjourned to the next morning, this case to be resumed at 9:15 o'clock a.m., February 27, 1958.) [570]

(Defense counsel, Mr. Kay, Mr. Hepp, and Mr. Nesbett, moved for judgments of acquittal on behalf of their respective clients.

(Following arguments by defense counsel and the United States Attorney, the Court ruled

motion for judgment of acquittal in the case of Defendant Smith denied, and reserved decision on motions for judgment of acquittal in the cases of Defendants Ing and Wright.

(Thereafter, all defense counsel rested their cases, closing arguments were had, and the case was submitted to the jury for deliberation.) [573]

The Court: Ladies and gentlemen of the jury, have you reached a verdict?

Jury Foreman: We have.

The Court: Very well, you may hand it—first—pardon me. Let's call the roll of the jury.

(Thereupon, the Deputy Clerk called the roll of the trial jury.)

Deputy Clerk: All members of the jury are present, your Honor.

The Court: Very well, you may hand the verdict to the Bailiff.

(Thereupon, the sealed verdict was handed to the Bailiff, the Bailiff handed it to the Court, and the Court handed the verdict to the Deputy Clerk with the instructions that the verdict be read and filed.) [576]

\* \* \*

Mr. Kay: Defendant Ing requests to poll the jury on the verdict just announced, your Honor.

The Court: Very well. Will you just be seated then. Would you then please poll the jury.



(Thereupon, the Deputy Clerk polled the jury and all of the jurors answered in the affirmative to the question put to them: "Is the verdict just read, your verdict?")

The Court: Very well. You may then proceed, at your convenience, with the reading of the other verdicts. [578]

\* \* \*

The Court: Ladies and gentlemen of the jury: Is that your verdict so say ye all?

The Jury: Yes.

The Court: Very well. You may now be excused then.

Mr. Nesbett: Pardon me, your Honor. I would like the jury polled as to Verdict No. 3.

The Court: All right. Thank you. Would you please poll the jury then as to Verdict No. 3.

(Thereupon, the Deputy Clerk polled the jury and all of the jurors answered in the affirmative to the question put to them: "Is the verdict just read, your verdict?")

The Court: Mr. Hepp, do you desire to have the jury [581] polled as to Mr. Wright?

Mr. Hepp: No.

The Court: Thank you. Very well, ladies and gentlemen, thanks for your services. You are now excused to report next Monday morning at the hour of 10:00 a.m. and there will be no movement in the courtroom while the jurors are going from the courtroom. [582]

United States of America,  
Territory of Alaska—ss.

I, Iris L. Stafford, Official Court Reporter of the  
above-entitled Court, hereby certify:

That the foregoing is a true and correct transcription of proceedings on the trial of the above-entitled action, taken by me in stenograph in open court at Anchorage, Alaska, on February 19 and 20, 1958, and thereafter transcribed by me.

/s/ IRIS L. STAFFORD.

United States of America,  
Territory of Alaska—ss.

I, Bonnie T. Brick, Official Court Reporter of the  
above-entitled Court, hereby certify:

That the foregoing is a true and correct transcription of proceedings on the trial of the above-entitled action, taken by me in stenograph in open court at Anchorage, Alaska, on February 24, 25, 26, 27, and 28, 1958, and thereafter transcribed by me.

/s/ BONNIE T. BRICK.

[Endorsed]: Filed October 10, 1958. [583]

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[Title of District Court and Cause.]

CLERK'S CERTIFICATE  
ORIGINAL RECORD

I, Wm. A. Hilton, Clerk of the above-entitled  
Court, do hereby certify that pursuant to Rule

10 (1) of the Rules of the United States Court of Appeals, Ninth Circuit, I am transmitting herewith the following Original Papers in my office dealing with the above-entitled action or proceeding:

1. Indictment.
2. Plea of Not Guilty, etc.
3. Verdict No. 1.
4. Judgment.
5. Notice of Appeal.
6. Motion for New Trial.
7. Praecipe (Designation of Record).
8. Statement of Points Relied On.

Reporter's transcript to follow when furnished.

The papers herewith transmitted constitute the record on appeal to the United States Court of Appeals, Ninth Circuit, San Francisco, California, from Judgment filed and entered in the above-entitled cause by the above-entitled Court on the 5th day of March, 1958.

Dated at Anchorage, Alaska, this 4th day of September, 1958.

[Seal]      /s/ WM. A. HILTON,  
Clerk.

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[Title of District Court and Cause.]

CLERK'S CERTIFICATE  
ORIGINAL RECORD

I, Wm. A. Hilton, Clerk of the above-entitled court, do hereby certify that pursuant to Rule 10 (1)

of the Rules of the United States Court of Appeals, Ninth Circuit, and Rules 75 (g) and 75 (o) of the Federal Rules of Civil Procedure and the designation of counsel for the defendant-appellant, I am transmitting herewith the Original Papers in my office dealing with the above-entitled action or proceeding. Reporter's transcript of record, in two volumes, mailed October 14, 1958.

The papers herewith transmitted constitute the record on appeal to the United States Court of Appeals, Ninth Circuit, San Francisco, California, from Judgment filed and entered in the above-entitled cause by the above-entitled Court on the 5th day of March, 1958.

Dated at Anchorage, Alaska, this 13th day of November, 1958.

[Seal]     /s/ WM. A. HILTON,  
Clerk.

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[Endorsed]: No. 16199. United States Court of Appeals for the Ninth Circuit. James Burton Ing and Raymond Wright, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeals from the District Court for the District of Alaska, Third Division.

Filed: September 8, 1958.

Docketed: September 29, 1958.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

